

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
RC PETITION

DO NOT WRITE IN THIS SPACE

Case No.


27-RC-319226

Date Filed

6/1/2023

INSTRUCTIONS: Unless e-Filed using the Agency's website, www.nlr.gov/, submit an original of this Petition to an NLRB office in the Region in which the employer concerned is located. The petition must be accompanied by both a showing of interest (see 6b below) and a certificate of service showing service on the employer and all other parties named in the petition of: (1) the petition; (2) Statement of Position form (Form NLRB-505); and (3) Description of Representation Case Procedures (Form NLRB 4812). The showing of interest should only be filed with the NLRB and should not be served on the employer or any other party.

1 PURPOSE OF THIS PETITION RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees. The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority pursuant to Section 9 of the National Labor Relations Act.

2a. Name of Employer: Opera Colorado Opera Center		2b. Address(es) of Establishment(s) involved (Street and number, City, State, ZIP code): 4121 S Navajo St., Ste. 100, Englewood, CO 80110	
3a. Employer Representative - Name and Title Greg Carpenter, The Ellie Caulkins General & Artistic Director		3b. Address (if same as 2b - state same): Same	
3c. Tel No 303-778-0095	3d. Cell No	3e. Fax No	3f. E-Mail Address gcarpenter@operacolorado.org
4a. Type of Establishment (Factory, mine, wholesaler, etc.) Entertainment company		4b. Principal Product or Service Opera	
5a. City and State where unit is located Englewood and Denver, CO		5b. Description of Unit Involved: Included: All solo singers, narrators, stage directors and their assistants, stage managers and their assistants, performers who have speaking parts, choreographers, solo and ensemble dancers, chorus singers, Artists in Residence. Excluded: All supervisors as defined by the Act.	
6a. Number of Employees in Unit Approximately 100		6b. Do a substantial number (30% or more) of the employees in the unit wish to be represented by the Petitioner? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
Check One <input checked="" type="checkbox"/> 7a. Request for recognition as Bargaining Representative was made on (Date) 5/22/2023 and Employer declined recognition <input type="checkbox"/> on or about (Date) 5/31/2023 (if no reply received so state)			
7b. Petitioner is currently recognized as Bargaining Representative and desires certification under the Act			
8a. Name of Recognized or Certified Bargaining Agent (if none, so state) None		8b. Address	
8c. Tel No	8d. Cell No	8e. Fax No	8f. E-Mail Address
8g. Affiliation, if any:		8h. Date of Recognition or Certification	8i. Expiration Date of Current or Most Recent Contract, if any (Month, Day, Year)
9. Is there now a strike or picketing at the Employer's establishment(s) involved? No if so approximately how many employees are participating? (Name of Labor Organization) has picketed the Employer since (Month, Day, Year)			
10. Organizations or individuals other than Petitioner and those named in items 8 and 9 which have claimed recognition as representatives and other organizations and individuals known to have a representative interest in any employees in the unit described in item 5b above (if none, so state) None			
10a. Name		10b. Address	
10c. Tel No		10d. Cell No	
10e. Fax No		10f. E-Mail Address	
11. Election Details: If the NLRB conducts and election in this matter, state your position with respect to any such election:			
11a. Election Type <input type="checkbox"/> Manual <input checked="" type="checkbox"/> Mail <input type="checkbox"/> Mixed Manual/Mail			
11b. Election Date(s): June 30, 2023		11c. Election Time(s): Mail ballot	
11d. Election Location(s): Mail ballot			
12a. Full Name of Petitioner (including local name and number): American Guild of Musical Artists		12b. Address (street and number, city, State and ZIP code) 305 7th Ave., Ste. 2A, New York, NY 10001	
12c. Full name of national or international labor organization of which Petitioner is an affiliate or constituent (if none, so state): American Federation of Labor and Congress of Industrial Organizations			
12d. Tel No 212-265-3687	12e. Cell No	12f. Fax No	12g. E-Mail Address gbraun@musicalartists.org
13. Representative of the Petitioner who will accept service of all papers for purposes of the representation proceeding.			
13a. Name and Title: Megan Stater Shaw, Attorney		13b. Address (street and number, city, State and ZIP code): 900 3rd Ave., Ste. 2100, New York, NY 10022	
13c. Tel No 212-365-0205	13d. Cell No 646-808-4662	13e. Fax No 646-473-8205	13f. E-Mail Address mshaw@cwsny.com
I declare that I have read the above petition and that the statements are true to the best of my knowledge and belief.			
Name (Print) Megan Stater Shaw		Signature 	Title Attorney
		Date 6/1/2023	

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA) 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register 71 Fed. Reg. 74942 43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information may cause the NLRB to decline to invoke its processes.



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Agency Website: www.nlrb.gov
Telephone: (303)844-3551
Fax: (303)844-6249



Download
NLRB
Mobile App

URGENT

June 2, 2023

Greg Carpenter, The Ellie Caulkins General
& Artistic Director
Opera Colorado Opera Center
4121 South Navajo Street
Suite 100
Englewood, CO 80110
gcarpenter@operacolorado.org

Re: Opera Colorado Opera Center
Case 27-RC-319226

Dear Mr. Carpenter:

Enclosed is a copy of a petition that American Guild of Musical Artists filed with the National Labor Relations Board (NLRB) seeking to represent certain of your employees. After a petition is filed, the employer is required to promptly take certain actions so please read this letter carefully to make sure you are aware of the employer's obligations. This letter tells you how to contact the Board agent who will be handling this matter, about the requirement to post and distribute the Notice of Petition for Election, the requirement to complete and serve a Statement of Position Form, the Petitioner's requirement to complete and serve a Responsive Statement of Position Form, a scheduled hearing in this matter, other information needed including a voter list, your right to be represented, and NLRB procedures, including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Attorney Todd Saveland whose telephone number is (720)709-7198. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. If the agent is not available, you may contact Assistant to the Regional Director Kelly Selvidge whose telephone number is (720)598-7389. The Board agent may also contact you and the other party or parties to schedule a conference meeting or telephonic or video conference for some time before the close of business the day following receipt of the final Responsive Statement(s) of Position. This will give the parties sufficient time to determine if any issues can be resolved prior to hearing or if a hearing is necessary. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Required Posting and Distribution of Notice: You must post the enclosed Notice of Petition for Election by Friday, June 9, 2023 in conspicuous places, including all places where notices to employees are customarily posted. The Notice of Petition for Election must be posted

so all pages are simultaneously visible. If you customarily communicate electronically with employees in the petitioned-for unit, you must also distribute the notice electronically to them. You must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Posting and distribution of the Notice of Petition for Election will inform the employees whose representation is at issue and the employer of their rights and obligations under the National Labor Relations Act in the representation context. Failure to post or distribute the notice may be grounds for setting aside an election if proper and timely objections are filed.

Required Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the employer is required to complete the enclosed Statement of Position form (including the attached Commerce Questionnaire), have it signed by an authorized representative, and file a completed copy (with all required attachments) with this office and serve it on all parties named in the petition such that it is received by them by **noon Mountain Time on Wednesday, June 14, 2023**. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will *not* be timely if filed on the due date but after noon Mountain Time.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

List(s) of Employees: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx)

Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's

Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Responsive Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, following timely filing and service of an employer's Statement of Position, the petitioner is required to complete the enclosed Responsive Statement of Position form, have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in the employer's Statement of Position, such that it is received no later than **noon Mountain Time on Tuesday, June 20, 2023.**

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **9:00 a.m. on Friday, June 23, 2023 by videoconference**, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, the NLRB will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party showing good cause, the regional director may postpone the hearing. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Other Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

- (a) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any of your employees in the unit involved in the petition (the petitioned-for unit);
- (b) The name and contact information for any other labor organization (union) claiming to represent any of the employees in the petitioned-for unit;
- (c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.
- (d) If you desire a formal check of the showing of interest, you must provide an alphabetized payroll list of employees in the petitioned-for unit, with their job classifications, for the payroll period immediately before the date of this petition. Such a payroll list should be submitted as early as possible prior to the hearing. Ordinarily a formal check of the showing of interest is not performed using the employee list submitted as part of the Statement of Position.

Voter List: If an election is held in this matter, the employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular telephone numbers) of eligible voters. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. I am advising you of this requirement now, so that you will have ample time to prepare this list. The list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlr.gov, or at the Regional office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any “inside knowledge” or favored relationship with the NLRB. Their knowledge regarding this matter was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Pursuant to Section 102.5 of the Board’s Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency’s web site (www.nlr.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determinations solely based on the documents and evidence properly submitted. All evidence

submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

Controlled Unclassified Information (CUI): This National Labor Relations Board (NLRB) proceeding may contain Controlled Unclassified Information (CUI). Subsequent information in this proceeding may also constitute CUI. National Archives and Records Administration (NARA) regulations at 32 CFR Part 2002 apply to all executive branch agencies that designate or handle information that meets the standards for CUI.

* * *

Information about the NLRB and our customer service standards is available on our website, www.nlrb.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,



MATTHEW S. LOMAX
Acting Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)
6. Responsive Statement of Position (Form 506)
7. Description of Voter List Requirement after Hearing in Certification and Decertification Cases (Form 5580)



National Labor Relations Board



NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that American Guild of Musical Artists has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 27-RC-319226 seeking an election to become certified as the representative of the employees of Opera Colorado Opera Center in the unit set forth below:

Included: All solo singers, narrators, stage directors and their assistants, stage managers and their assistants, performers who have speaking parts, choreographers, solo and ensemble dancers, chorus singers, Artists in Residence.

Excluded: All supervisors as defined by the Act.

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

YOU HAVE THE RIGHT under Federal Law

- To self-organization
- To form, join, or assist labor organizations
- To bargain collectively through representatives of your own choosing
- To act together for the purposes of collective bargaining or other mutual aid or protection
- To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).

PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. **NO FINAL DECISIONS HAVE BEEN MADE YET** regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

IF AN ELECTION IS HELD, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- Threatening loss of jobs or benefits by an employer or a union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or, if the election is conducted by mail, from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return
- Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a union or an employer to influence their votes

Please be assured that IF AN ELECTION IS HELD, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to www.nlr.gov or contact the NLRB at (303)844-3551.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.



National Labor Relations Board





UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27



Opera Colorado Opera Center Employer and American Guild of Musical Artists Petitioner	Case 27-RC-319226
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NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.

YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, a hearing will be held at 9:00 a.m. on **Friday, June 23, 2023**, and on consecutive days thereafter until concluded, by videoconference. The hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Opera Colorado Opera Center must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Mountain time on **Wednesday, June 14, 2023**. Following timely filing and service of a Statement of Position by Opera Colorado Opera Center, the Petitioner must complete its Responsive Statement of Position(s) responding to the issues raised in the Employer's and/or Union's Statement of Position and file them and all attachments with the Regional Director and serve them on the parties named in the petition such that they are received by them no later than **noon** Mountain on **Tuesday, June 20, 2023**.

Pursuant to Section 102.5 of the Board's Rules and Regulations, all documents filed in cases before the Agency must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing the document does not have access to the means for filing electronically or filing electronically would impose an undue burden. Documents filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide](#)

The Statement of Position and Responsive Statement of Position must be E-Filed but, unlike other E-Filed documents, must be filed by **noon** Mountain on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position and Responsive Statement of Position are not required to be filed. If an election agreement is signed by all parties and returned to the Regional office after the due date of the Statement of Position but before the due date of the Responsive Statement of Position, the Responsive Statement of Position is not required to be filed.

Dated: June 2, 2023



MATTHEW S. LOMAX
ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

DESCRIPTION OF REPRESENTATION CASE PROCEDURES
IN CERTIFICATION AND DECERTIFICATION CASES

The National Labor Relations Act grants employees the right to bargain collectively through representatives of their own choosing and to refrain from such activity. A party may file an RC, RD or RM petition with the National Labor Relations Board (NLRB) to conduct a secret ballot election to determine whether a representative will represent, or continue to represent, a unit of employees. An **RC** petition is generally filed by a union that desires to be certified as the bargaining representative. An **RD** petition is filed by employees who seek to remove the currently recognized union as the bargaining representative. An **RM** petition is filed by an employer who seeks an election because one or more individuals or unions have sought recognition as the bargaining representative, or based on a reasonable belief supported by objective considerations that the currently recognized union has lost its majority status. This form generally describes representation case procedures in RC, RD and RM cases, also referred to as certification and decertification cases.

Right to be Represented – Any party to a case with the NLRB has the right to be represented by an attorney or other representative in any proceeding before the NLRB. A party wishing to have a representative appear on its behalf should have the representative complete a Notice of Appearance (Form NLRB-4701), and E-File it at www.nlrb.gov or forward it to the NLRB Regional Office handling the petition as soon as possible.

Filing and Service of Petition – A party filing an RC, RD or RM petition is required to serve a copy of its petition on the parties named in the petition along with this form and the Statement of Position form. The petitioner files the petition with the NLRB, together with (1) a certificate showing service of these documents on the other parties named in the petition, and (2) a showing of interest to support the petition. The showing of interest is not served on the other parties.

Notice of Hearing – After a petition in a certification or decertification case is filed with the NLRB, the NLRB reviews the petition, certificate of service, and the required showing of interest for sufficiency, assigns the petition a case number, and promptly sends letters to the parties notifying them of the Board agent who will be handling the case. In most cases, the letters include a Notice of Representation Hearing. Except in cases presenting unusually complex issues, this pre-election hearing is set for a date 14 business days (excluding weekends and federal holidays) from the date of service of the notice of hearing. Once the hearing begins, it will continue day to day until completed absent extraordinary circumstances. The Notice of Representation Hearing also sets the due date for filing and serving the Statement(s) of Position and the Responsive Statement of Position(s). Included with the Notice of Representation Hearing are the following: (1) copy of the petition, (2) this form, (3) Statement of Position for non-petitioning parties, (4) petitioner's Responsive Statement of Position, (5) Notice of Petition for Election, and (6) letter advising how to contact the Board agent who will be handling the case and discussing those documents.

Hearing Postponement: Requests to postpone the hearing are not routinely granted, but the regional director may postpone the hearing for good cause. A party wishing to request a postponement should make the request in writing and set forth in detail the grounds for the request. The request should include the positions of the other parties regarding the postponement. The request must be filed electronically ("E-Filed") on the Agency's website (www.nlrb.gov) by following the instructions on the website. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Statement of Position Form and List(s) of Employees – The Statement of Position form solicits commerce and other information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. In an **RC** or **RD** case, as part of its Statement of Position form, the employer also provides a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. If the employer contends that the proposed unit is not appropriate, the employer must separately list the same information for all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit, and must further indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on

the NLRB website at [www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx)

Ordinarily the Statement of Position must be filed with the Regional Office and served on the other parties such that it is received by them by noon 8 business days from the issuance of the Notice of Hearing. The regional director may postpone the due date for filing and serving the Statement of Position for good cause. The Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Statement of Position due date. If a party wishes to request both a postponement of the hearing and a postponement of the Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Responsive Statement of Position – Petitioner's Responsive Statement(s) of Position solicits a response to the Statement(s) of Position filed by the other parties and further facilitates entry into election agreements or streamlines the preelection hearing. A petitioner must file a Responsive Statement of Position in response to each party's Statement of Position addressing each issue in each Statement of Position(s), if desired. In the case of an RM petition, the employer-petitioner must also provide commerce information and file and serve a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit. Ordinarily, the Responsive Statement of Position must be electronically filed with the Regional Office and served on the other parties such that it is received by noon 3 business days prior to the hearing. The regional director may postpone the due date for filing and serving the Responsive Statement of Position for good cause. The Responsive Statement of Position form must be E-Filed but, unlike other E-Filed documents, will not be timely if filed on the due date but after noon in the time zone of the Region where the petition is filed. Consequences for failing to satisfy the Responsive Statement of Position requirement are discussed on the following page under the heading "Preclusion." A request to postpone the hearing will not automatically be treated as a request for an extension of the Responsive Statement of Position due date. If a party wishes to request both a postponement of the hearing and a Postponement of the Responsive Statement of Position due date, the request must make that clear and must specify the reasons that postponements of both are sought.

Posting and Distribution of Notice of Petition for Election – Within 5 business days after service of the notice of hearing, the employer must post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and must also distribute it electronically to the employees in the petitioned-for unit if the employer customarily communicates with these employees electronically. The employer must maintain the posting until the petition is dismissed or withdrawn, or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election if proper and timely objections are filed.

Election Agreements – Elections can occur either by agreement of the parties or by direction of the regional director or the Board. Three types of agreements are available: (1) a Consent Election Agreement (Form NLRB-651); (2) a Stipulated Election Agreement (Form NLRB-652); and (3) a Full Consent Agreement (Form NLRB-5509). In the Consent Election Agreement and the Stipulated Election Agreement, the parties agree on an appropriate unit and the method, date, time, and place of a secret ballot election that will be conducted by an NLRB agent. In the Consent Agreement, the parties also agree that post-election matters (election objections or determinative challenged ballots) will be resolved with finality by the regional director; whereas in the Stipulated Election Agreement, the parties agree that they may request Board review of the regional director's post-election determinations. A Full Consent Agreement provides that the regional director will make final determinations regarding all pre-election and post-election issues.

Hearing Cancellation Based on Agreement of the Parties – The issuance of the Notice of Representation Hearing does not mean that the matter cannot be resolved by agreement of the parties. On the contrary, the NLRB encourages prompt voluntary adjustments and the Board agent assigned to the case will work with the parties to enter into an election agreement, so the parties can avoid the time and expense of participating in a hearing.

Hearing – A hearing will be held unless the parties enter into an election agreement approved by the regional director or the petition is dismissed or withdrawn.

Purpose of Hearing: The primary purpose of a pre-election hearing is to determine if a question of representation exists. A question of representation exists if a proper petition has been filed concerning a unit

appropriate for the purpose of collective bargaining or, in the case of a decertification petition, concerning a unit in which a labor organization has been certified or is being currently recognized by the employer as the bargaining representative.

Issues at Hearing: Issues that might be litigated at the pre-election hearing include: jurisdiction; labor organization status; bars to elections; unit appropriateness; expanding and contracting unit issues; inclusion of professional employees with nonprofessional employees; seasonal operation; potential mixed guard/non-guard unit; and eligibility formulas. At the hearing, the timely filed Statement of Position and Responsive Statement of Position(s) will be received into evidence. The hearing officer will not receive evidence concerning any issue as to which the parties have not taken adverse positions, except for evidence regarding the Board's jurisdiction over the employer and evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the regional director determines that record evidence is necessary.

Preclusion: At the hearing, a party will be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or Responsive Statement of Position(s) or to place in dispute in timely response to another party's Statement of Position or response, except that no party will be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. As set forth in §102.66(d) of the Board's rules, if the employer fails to timely furnish the lists of employees, the employer will be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Conduct of Hearing: If held, the hearing is usually open to the public and will be conducted by a hearing officer of the NLRB. Any party has the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation. The hearing officer also has the power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses will be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Parties appearing at any hearing who have or whose witnesses have disabilities falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.503, and who in order to participate in this hearing need appropriate auxiliary aids, as defined in 29 C.F.R. 100.503, should notify the regional director as soon as possible and request the necessary assistance.

Official Record: An official reporter will make the only official transcript of the proceedings and all citations in briefs or arguments must refer to the official record. (Copies of exhibits should be supplied to the hearing officer and other parties at the time the exhibit is offered in evidence.) All statements made at the hearing will be recorded by the official reporter while the hearing is on the record. If a party wishes to make off-the-record remarks, requests to make such remarks should be directed to the hearing officer and not to the official reporter. After the close of the hearing, any request for corrections to the record, either by stipulation or motion, should be forwarded to the regional director.

Motions and Objections: All motions must be in writing unless stated orally on the record at the hearing and must briefly state the relief sought and the grounds for the motion. A copy of any motion must be served immediately on the other parties to the proceeding. Motions made during the hearing are filed with the hearing officer. All other motions are filed with the regional director, except that motions made after the transfer of the record to the Board are filed with the Board. If not E-Filed, an original and two copies of written motions shall be filed. Statements of reasons in support of motions or objections should be as concise as possible. Objections shall not be deemed waived by further participation in the hearing. On appropriate request, objections may be permitted to stand to an entire line of questioning. Automatic exceptions will be allowed to all adverse rulings.

Election Details: Prior to the close of the hearing the hearing officer will: (1) solicit the parties' positions (but will not permit litigation) on the type, date(s), time(s), and location(s) of the election and the

eligibility period; (2) solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the regional director should transmit the Notice of Election if an election is directed; (3) inform the parties that the regional director will issue a decision as soon as practicable and will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and (4) inform the parties of their obligations if the director directs an election and of the time for complying with those obligations.

Oral Argument and Briefs: Upon request, any party is entitled to a reasonable period at the close of the hearing for oral argument, which will be included in the official transcript of the hearing. At any time before the close of the hearing, any party may file a memorandum addressing relevant issues or points of law. Post-hearing briefs shall be due within 5 business days of the close of the hearing. The hearing officer may allow up to 10 additional business days for such briefs prior to the close of hearing and for good cause. If filed, copies of the memorandum or brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the memorandum or brief. No reply brief may be filed except upon special leave of the regional director. Briefs including electronic documents, filed with the Regional Director must be formatted as double-spaced in an 8½ by 11 inch format and must be e-filed through the Board's website, www.nlr.gov.

Regional Director Decision - After the hearing, the regional director issues a decision directing an election, dismissing the petition or reopening the hearing. A request for review of the regional director's pre-election decision may be filed with the Board at any time after issuance of the decision until 10 business days after a final disposition of the proceeding by the regional director. Accordingly, a party need not file a request for review before the election in order to preserve its right to contest that decision after the election. Instead, a party can wait to see whether the election results have mooted the basis of an appeal. The Board will grant a request for review only where compelling reasons exist therefor.

Voter List – The employer must provide to the regional director and the parties named in the election agreement or direction of election a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters. (In construction industry elections, unless the parties stipulate to the contrary, also eligible to vote are all employees in the unit who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.) The employer must also include in a separate section of the voter list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge. The list of names must be alphabetized (overall or by department) and be in the same Microsoft Word file (or Microsoft Word compatible file) format as the initial lists provided with the Statement of Position form unless the parties agree to a different format or the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list must be filed electronically with the regional director and served electronically on the other parties named in the agreement or direction. To be timely filed and served, the voter list must be received by the regional director and the parties named in the agreement or direction respectively within 2 business days after the approval of the agreement or issuance of the direction of elections unless a longer time is specified in the agreement or direction. A certificate of service on all parties must be filed with the regional director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

Waiver of Time to Use Voter List – Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 calendar days after the date when the employer must file the voter list with the Regional Office. However, the parties entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483. A waiver will not be effective unless all parties who are entitled to the list agree to waive the same number of days.

Election – Information about the election, requirements to post and distribute the Notice of Election, and possible proceedings after the election is available from the Regional Office and will be provided to the parties when the Notice of Election is sent to the parties.

Withdrawal or Dismissal – If it is determined that the NLRB does not have jurisdiction or that other criteria for proceeding to an election are not met, the petitioner is offered an opportunity to withdraw the petition. If the petitioner does not withdraw the petition, the regional director will dismiss the petition and advise the petitioner of the reason for the dismissal and of the right to appeal to the Board.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A STATEMENT OF POSITION FORM

Completing and Filing this Form: The Notice of Hearing indicates which parties are responsible for completing the form. If you are required to complete the form, you must have it signed by an authorized representative and file a completed copy (including all attachments) with the RD and serve copies on all parties named in the petition by the date and time established for its submission. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You must EFile your Statement of Position at www.nlrb.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed.**

Note: *Non-employer parties who complete this Statement of Position are NOT required to complete items 8f and 8g of the form, or to provide a commerce questionnaire or the lists described in item 7.*

Required Lists: The employer's Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the employer contends that the proposed unit is inappropriate, the employer must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. These lists must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at [www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlrb.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx).

Consequences of Failure to Supply Information: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
STATEMENT OF POSITION

DO NOT WRITE IN THIS SPACE

Case No.

27-RC-319226

Date Filed

June 1, 2023

INSTRUCTIONS: Submit this Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and all attachments on each party named in the petition in this case such that it is received by them by the date and time specified in the notice of hearing.

Note: Non-employer parties who complete this form are NOT required to complete items 8f or 8g below or to provide a commerce questionnaire or the lists described in item 7.

1a. Full name of party filing Statement of Position

1c. Business Phone:

1e. Fax No.:

1b. Address (Street and number, city, state, and ZIP code)

1d. Cell No.:

1f. e-Mail Address

2. Do you agree that the NLRB has jurisdiction over the Employer in this case? ☐ Yes ☐ No

(A completed commerce questionnaire (Attachment A) must be submitted by the Employer, regardless of whether jurisdiction is admitted)

3. Do you agree that the proposed unit is appropriate? ☐ Yes ☐ No (If not, answer 3a and 3b.)

a. State the basis for your contention that the proposed unit is not appropriate. (If you contend a classification should be excluded or included briefly explain why, such as shares a community of interest or are supervisors or guards)

b. State any classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit.

Added

Excluded

4. Other than the individuals in classifications listed in 3b, list any individual(s) whose eligibility to vote you intend to contest at the pre-election hearing in this case and the basis for contesting their eligibility.

5. Is there a bar to conducting an election in this case? ☐ Yes ☐ No If yes, state the basis for your position.

6. Describe all other issues you intend to raise at the pre-election hearing.

7. The employer must provide the following lists which must be alphabetized (overall or by department) in the format specified at

[www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx).

(a) A list containing the full names, work locations, shifts and job classification of all individuals in the proposed unit as of the payroll period immediately preceding the filing of the petition who remain employed as of the date of the filing of the petition. (Attachment B)

(b) If the employer contends that the proposed unit is inappropriate the employer must provide (1) a separate list containing the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit, if any to make it an appropriate unit, (Attachment C) and (2) a list containing the full names of any individuals it contends must be excluded from the proposed unit to make it an appropriate unit. (Attachment D)

8a. State your position with respect to the details of any election that may be conducted in this matter. Type: ☐ Manual ☐ Mail ☐ Mixed Manual/Mail

8b. Date(s)

8c. Time(s)

8d. Location(s)

8e. Eligibility Period (e.g. special eligibility formula)

8f. Last Payroll Period Ending Date

8g. Length of payroll period
☐ Weekly ☐ Biweekly ☐ Other (specify length)

9. Representative who will accept service of all papers for purposes of the representation proceeding

9a. Full name and title of authorized representative

9b. Signature of authorized representative

9c. Date

9d. Address (Street and number, city, state, and ZIP code)

9e. e-Mail Address

9f. Business Phone No.:

9g. Fax No.

9h. Cell No.

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

QUESTIONNAIRE ON COMMERCE INFORMATION

Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.

CASE NAME Opera Colorado Opera Center	CASE NUMBER 27-RC-319226
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1. EXACT LEGAL TITLE OF ENTITY (As filed with State and/or stated in legal documents forming entity)**2. TYPE OF ENTITY**☐ CORPORATION ☐ LLC ☐ LLP ☐ PARTNERSHIP ☐ SOLE PROPRIETORSHIP ☐ OTHER (Specify)**3. IF A CORPORATION or LLC**

A. STATE OF INCORPORATION OR FORMATION	B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES
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4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS**5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR****6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS (Products handled or manufactured, or nature of services performed).****7A. PRINCIPAL LOCATION:****7B. BRANCH LOCATIONS:****8. NUMBER OF PEOPLE PRESENTLY EMPLOYED**

A. TOTAL:

B. AT THE ADDRESS INVOLVED IN THIS MATTER:

9. DURING THE MOST RECENT (Check the appropriate box): ☐ CALENDAR ☐ 12 MONTHS or ☐ FISCAL YEAR (FY DATES _____)

	YES	NO
A. Did you provide services valued in excess of \$50,000 directly to customers outside your State? If no, indicate actual value. \$ _____		
B. If you answered no to 9A, did you provide services valued in excess of \$50,000 to customers in your State who purchased goods valued in excess of \$50,000 from directly outside your State? If no, indicate the value of any such services you provided. \$ _____		
C. If you answered no to 9A and 9B, did you provide services valued in excess of \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than \$50,000, indicate amount. \$ _____		
D. Did you sell goods valued in excess of \$50,000 directly to customers located outside your State? If less than \$50,000, indicate amount. \$ _____		
E. If you answered no to 9D, did you sell goods valued in excess of \$50,000 directly to customers located inside your State who purchased other goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$ _____		
F. Did you purchase and receive goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$ _____		
G. Did you purchase and receive goods valued in excess of \$50,000 from enterprises who received the goods directly from points outside your State? If less than \$50,000, indicate amount. \$ _____		
H. Gross Revenues from all sales or performance of services (Check the largest amount) <input type="checkbox"/> \$100,000 <input type="checkbox"/> \$250,000 <input type="checkbox"/> \$500,000 <input type="checkbox"/> \$1,000,000 or more If less than \$100,000, indicate amount.		
I. Did you begin operations within the last 12 months? If yes, specify date: _____		

10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?☐ YES ☐ NO (If yes, name and address of association or group).**11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS**

NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER
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12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE (Type or Print)	SIGNATURE	E-MAIL ADDRESS	DATE
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PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

REVIEW THE FOLLOWING IMPORTANT INFORMATION BEFORE FILLING OUT A RESPONSIVE STATEMENT OF POSITION FORM

Completing and Filing this Form: For **RC and RD petitions**, the Petitioner is required to complete this form in response to each timely filed and served Statement of Position filed by another party. For **RM petitions**, the Employer-Petitioner must complete a Responsive Statement of Position form and submit the list described below. In accordance with Section 102.63(b) of the Board's Rules, if you are required to complete the form, you must have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition responding to the issues raised in another party's Statement of Position, such that it is received no later than noon three business days before the date of the hearing. A separate form must be completed for each timely filed and properly served Statement of Position you receive. If more space is needed for your answers, additional pages may be attached. If you have questions about this form or would like assistance in filling out this form, please contact the Board agent assigned to handle this case. **You must E-File your Responsive Statement of Position at www.NLRB.gov, but unlike other e-Filed documents, it will *not* be timely if filed on the due date but after noon in the time zone of the Region where the petition was filed. Note that if you are completing this form as a PDF downloaded from www.NLRB.gov, the form will lock upon signature and no further editing may be made.**

Required List: In addition to responding to the issues raised in another party's Statement of Position, if any, the Employer-Petitioner in an RM case is required to file and serve on the parties a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. This list must be alphabetized (overall or by department). Unless the employer certifies that it does not possess the capacity to produce the list in the required form, the list must be in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word, the first column of the table must begin with each employee's last name, and the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx

Consequences of Failure to Submit a Responsive Statement of Position: Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
RESPONSIVE STATEMENT OF POSITION – RC, RD or RM PETITION

DO NOT WRITE IN THIS SPACE

Case No.
27-RC-319226

Date Filed
June 1, 2023

INSTRUCTIONS: If a party has submitted and served on you a timely Statement of Position to an RC, RD or RM petition, the Petitioner must submit this Responsive Statement of Position to an NLRB Office in the Region in which the petition was filed and serve it and any attachments on each party named in the petition in this case such that it is received by noon local time, three business days prior to the hearing date specified in the Notice of Hearing. A separate form must be completed for each timely filed and properly served Statement of Position received by the Petitioner. The Petitioner-Employer in a RM case is required to file this Responsive Statement of Position and include an appropriate employee list without regard to whether another party has filed a Statement of Position.

This Responsive Statement of Position is filed by the Petitioner in response to a Statement of Position received from the following party:

The Employer

An Intervenor/Union

1a. Full Name of Party Filing Responsive Statement of Position

1c. Business Phone

1d. Cell No.

1e. Fax No.

1f. E-Mail Address

1b. Address (Street and Number, City, State, and ZIP Code)

2. Identify all issues raised in the other party's Statement of Position that you dispute and describe the basis of your dispute:

a. EMPLOYER NAME/IDENTITY [Box 1a of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

b. JURISDICTION [Box 2 of Statement of Position Form NLRB-505 and Questionnaire on Commerce Information]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

c. APPROPRIATENESS OF UNIT [Boxes 3, 3a and 3b of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

d. INDIVIDUAL ELIGIBILITY [Box 4 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

e. BARS TO ELECTION [Box 5 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

f. ALL OTHER ISSUES [Box 6 of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

g. ELECTION DETAILS [Boxes 8a, 8b, 8c, 8d, 8e, 8f, and 8g of Statement of Position Form NLRB-505]

☐ No Dispute (no further response required) ☐ Dispute (response required below)

Response to Statement of Position:

Full Name and Title of Authorized Representative

Signature of Authorized Representative

Date

WILLFUL FALSE STATEMENTS ON THIS PETITION CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001) PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. Section 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation proceedings. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. 74942-43 (December 13, 2006). The NLRB will further explain these uses upon request. Failure to supply the information requested by this form may preclude you from litigating issues under 102.66(d) of the Board's Rules and Regulations and may cause the NLRB to refuse to further process a representation case or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.

Please fill all necessary fields on the form PRIOR to digitally signing. To make changes after the form has been signed, right-click on the signature field and click "clear signature." Once complete, please sign the form.

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

**DESCRIPTION OF VOTER LIST REQUIREMENT AFTER HEARING IN CERTIFICATION AND
DECERTIFICATION CASES**

If an election is directed, the employer must provide the voter list. To be timely filed and served, the voter list must be *received* by the Regional Director and the parties named in the Decision and Direction of Election within 2 business days after the issuance of the Decision unless a longer period, based on extraordinary circumstances, is specified in the Decision and Direction of Election. A certificate of service on all parties must be filed with the Regional Director when the voter list is filed. The region will not serve the voter list.

List Contents - The list must include the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses and available home and personal cellular telephone numbers of all eligible voters). The Employer must also include in separate sections of that list the same information for those individuals the parties have agreed will be permitted to vote subject to challenge or those individuals who, according to the Decision and Direction of Election, will be permitted to vote subject to challenge.

List Format - The list must be in an electronic format approved by the General Counsel, unless the Employer certifies that it does not have the capacity to produce the list in the required format. Accordingly, unless otherwise agreed to by the parties, the list must be provided in a table in a Microsoft Word file (.doc or .docx) or a file that is compatible with Microsoft Word (.doc or .docx). The first column of the list must begin with each employee's last name and the list must be alphabetized (overall or by department) by last name. Because the list will be used during the election, the font size of the list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the list is provided on the NLRB website at: [www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional Forms for Voter List.docx](http://www.nlr.gov/sites/default/files/attachments/basic-page/node-4559/Optional%20Forms%20for%20Voter%20List.docx).

It may be appropriate for the Employer to produce multiple versions of the list where the data required is kept in separate databases or files so long as all of the lists link the information to the same employees, using the same names, in the same order and are provided within the allotted time. If the Employer provides multiple lists, the list used at the election will be the list containing the employees' names and addresses.

Filing of the List - The voter list must be filed electronically by submitting (E-Filing) it through the Agency's website (www.nlr.gov), unless the Employer provides a written statement explaining why electronic submission is not possible or feasible. The Employer must also electronically serve the list on the other parties. To file electronically, go to www.nlr.gov, click on *E-File Case Documents*, and follow the detailed instructions. The burden of establishing the timely filing and receipt of the list is on the sending party. If you have questions about the submission, please promptly contact the Board agent investigating the petition.

Service of the List - The list must be served on the parties named in the Decision and Direction of Election within 2 business days after issuance of the Decision, unless another date has been specified. A certificate of service on all parties must be filed with the Regional Director when the voter list is filed. The Employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed. The Employer may not object to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure.

The parties are not allowed to use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

Agency Website: www.nlrb.gov
Telephone: (303)844-3551
Fax: (303)844-6249



Download
NLRB
Mobile App

URGENT

June 2, 2023

American Guild of Musical Artists
305 7th Avenue, Suite 2A
New York, NY 10001
gbraun@musicalartists.org

Re: Opera Colorado Opera Center
Case 27-RC-319226

Dear Sir or Madam:

The enclosed petition that you filed with the National Labor Relations Board (NLRB) has been assigned the above case number. This letter tells you how to contact the Board agent who will be handling this matter; explains your obligation to provide the originals of the showing of interest and the requirement that you complete and serve a Responsive Statement of Position form in response to each timely filed and served Statement(s) of Position; notifies you of a hearing; describes the employer's obligation to post and distribute a Notice of Petition for Election, complete a Statement of Position and provide a voter list; requests that you provide certain information; notifies you of your right to be represented; and discusses some of our procedures including how to submit documents to the NLRB.

Investigator: This petition will be investigated by Field Attorney Todd Saveland whose telephone number is (720)709-7198. The Board agent will contact you shortly to discuss processing the petition. If you have any questions, please do not hesitate to call the Board agent. The Board agent may also contact you and the other party or parties to schedule a conference meeting or telephonic or video conference for some time before the close of business the day following receipt of the final Responsive Statement(s) of Position. This will give the parties sufficient time to determine if any issues can be resolved prior to hearing or if a hearing is necessary. If the agent is not available, you may contact Assistant to the Regional Director Kelly Selvidge whose telephone number is (720)598-7389. If appropriate, the NLRB attempts to schedule an election either by agreement of the parties or by holding a hearing and then directing an election.

Showing of Interest: If the Showing of Interest you provided in support of your petition was submitted electronically or by fax, the original documents which constitute the Showing of Interest containing handwritten signatures must be delivered to the Regional office within **2 business days**. If the originals are not received within that time the Region will dismiss your petition.

Notice of Hearing: Enclosed is a Notice of Representation Hearing to be conducted at **9:00 a.m. on Friday, June 23, 2023 by videoconference**, if the parties do not voluntarily agree to an election. If a hearing is necessary, the hearing will run on consecutive days until concluded unless the regional director concludes that extraordinary circumstances warrant otherwise. Before the hearing begins, we will continue to explore potential areas of agreement with the parties in order to reach an election agreement and to eliminate or limit the costs associated with formal hearings.

Upon request of a party showing good cause, the regional director may postpone the hearing. A party desiring a postponement should make the request to the regional director in writing, set forth in detail the grounds for the request, and include the positions of the other parties regarding the postponement. E-Filing the request is required. A copy of the request must be served simultaneously on all the other parties, and that fact must be noted in the request.

Posting and Distribution of Notice: The Employer must post the enclosed Notice of Petition for Election by Friday, June 9, 2023 in conspicuous places, including all places where notices to employees are customarily posted. If it customarily communicates electronically with its employees in the petitioned-for unit, it must also distribute the notice electronically to them. The Employer must maintain the posting until the petition is dismissed or withdrawn or this notice is replaced by the Notice of Election. Failure to post or distribute the notice may be grounds for setting aside the election if proper and timely objections are filed.

Statement of Position: In accordance with Section 102.63(b) of the Board's Rules, the Employer is required to complete the enclosed Statement of Position form, have it signed by an authorized representative, and file a completed copy with any necessary attachments, with this office and serve it on all parties named in the petition by **noon Mountain Time on Wednesday, June 14, 2023**. The Statement of Position must include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. If the Employer contends that the proposed unit is inappropriate, it must separately list the full names, work locations, shifts and job classifications of all individuals that it contends must be added to the proposed unit to make it an appropriate unit. The Employer must also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit.

Required Responsive Statement of Position (RSOP): In accordance with Section 102.63(b) of the Board's Rules, following timely filing and service of a Statement of Position, the petitioner is required to complete the enclosed Responsive Statement of Position form addressing issues raised in any Statement(s) of Position. The petitioner must file a complete, signed RSOP in response to all other parties' timely filed and served Statement of Position, with all required attachments, with this office and serve it on all parties named in the petition such that it is received by them by **noon Mountain Time on Tuesday, June 20, 2023**. This form solicits information that will facilitate entry into election agreements or streamline the pre-election hearing if the parties are unable to enter into an election agreement. **This form must be e-Filed, but unlike other e-Filed documents, will not be timely if filed on the due date but after noon Mountain Time.** If you have questions about this form or would like assistance in filling out this form, please contact the Board agent named above.

Failure to Supply Information: Failure to supply the information requested by the RSOP form may preclude you from litigating issues under Section 102.66(d) of the Board's Rules and Regulations. Section 102.66(d) provides as follows:

A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party's Statement of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §§ 102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses.

Voter List: If an election is held in this matter, the Employer must transmit to this office and to the other parties to the election, an alphabetized list of the full names and addresses of all eligible voters, including their shifts, job classifications, work locations, and other contact information including available personal email addresses and available personal home and cellular telephone numbers. Usually, the list must be furnished within 2 business days of the issuance of the Decision and Direction of Election or approval of an election agreement. The list must be electronically filed with the Region and served electronically on the other parties. To guard against potential abuse, this list may not be used for purposes other than the representation proceeding, NLRB proceedings arising from it or other related matters.

Under existing NLRB practice, an election is not ordinarily scheduled for a date earlier than 10 days after the date when the Employer must file the voter list with the Regional Office. However, a petitioner and/or union entitled to receive the voter list may waive all or part of the 10-day period by executing Form NLRB-4483, which is available on the NLRB's website or from an NLRB office. A waiver will not be effective unless all parties who are entitled to the voter list agree to waive the same number of days.

Information Needed Now: Please submit to this office, as soon as possible, the following information needed to handle this matter:

- (a) The correct name of the Union as stated in its constitution or bylaws.
- (b) A copy of any existing or recently expired collective-bargaining agreements, and any amendments or extensions, or any recognition agreements covering any employees in the petitioned-for unit.
- (c) If potential voters will need notices or ballots translated into a language other than English, the names of those languages and dialects, if any.
- (d) The name and contact information for any other labor organization (union) claiming to represent or have an interest in any of the employees in the petitioned-for unit and for any employer who may be a joint employer of the employees in the proposed unit. Failure to disclose the existence of an interested party may delay the processing of the petition.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before the NLRB. In view of our policy of processing these cases expeditiously, if you wish to be represented, you should obtain representation promptly. Your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlrb.gov, or from an NLRB office upon your request.

If someone contacts you about representing you in this case, please be assured that no organization or person seeking your business has any “inside knowledge” or favored relationship with the NLRB. Their knowledge regarding this matter was obtained only through access to information that must be made available to any member of the public under the Freedom of Information Act.

Procedures: Pursuant to Section 102.5 of the Board’s Rules and Regulations, parties must submit all documentary evidence, including statements of position, exhibits, sworn statements, and/or other evidence, by electronically submitting (E-Filing) them through the Agency’s web site (www.nlrb.gov). You must e-file all documents electronically or provide a written statement explaining why electronic submission is not possible or feasible. Failure to comply with Section 102.5 will result in rejection of your submission. The Region will make its determinations solely based on the documents and evidence properly submitted. All evidence submitted electronically should be in the form in which it is normally used and maintained in the course of business (i.e., native format). Where evidence submitted electronically is not in native format, it should be submitted in a manner that retains the essential functionality of the native format (i.e., in a machine-readable and searchable electronic format). If you have questions about the submission of evidence or expect to deliver a large quantity of electronic records, please promptly contact the Board agent investigating the petition.

Controlled Unclassified Information (CUI): This National Labor Relations Board (NLRB) proceeding may contain Controlled Unclassified Information (CUI). Subsequent information in this proceeding may also constitute CUI. National Archives and Records

Administration (NARA) regulations at 32 CFR Part 2002 apply to all executive branch agencies that designate or handle information that meets the standards for CUI.

* * *

Information about the NLRB and our customer service standards is available on our website, www.nlr.gov, or from an NLRB office upon your request. We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,

A handwritten signature in black ink, appearing to read "Matthew Lomax", written in a cursive style.

MATTHEW S. LOMAX
Acting Regional Director

Enclosures

1. Petition
2. Notice of Petition for Election (Form 5492)
3. Notice of Representation Hearing
4. Description of Procedures in Certification and Decertification Cases (Form 4812)
5. Statement of Position form and Commerce Questionnaire (Form 505)
6. Responsive Statement of Position (Form 506)
7. Description of Voter List Requirement after Hearing in Certification and Decertification Cases (Form 5580)

cc: Megan S. Shaw, Esq.
Cohen Weiss & Simon LLP
900 Third Avenue, 21st Floor
New York, NY 10022-4869
mshaw@cwsny.com



National Labor Relations Board



NOTICE OF PETITION FOR ELECTION

This notice is to inform employees that American Guild of Musical Artists has filed a petition with the National Labor Relations Board (NLRB), a Federal agency, in Case 27-RC-319226 seeking an election to become certified as the representative of the employees of Opera Colorado Opera Center in the unit set forth below:

Included: All solo singers, narrators, stage directors and their assistants, stage managers and their assistants, performers who have speaking parts, choreographers, solo and ensemble dancers, chorus singers, Artists in Residence.

Excluded: All supervisors as defined by the Act.

This notice also provides you with information about your basic rights under the National Labor Relations Act, the processing of the petition, and rules to keep NLRB elections fair and honest.

YOU HAVE THE RIGHT under Federal Law

- To self-organization
- To form, join, or assist labor organizations
- To bargain collectively through representatives of your own choosing
- To act together for the purposes of collective bargaining or other mutual aid or protection
- To refuse to do any or all of these things unless the union and employer, in a state where such agreements are permitted, enter into a lawful union-security agreement requiring employees to pay periodic dues and initiation fees. Nonmembers who inform the union that they object to the use of their payments for nonrepresentational purposes may be required to pay only their share of the union's costs of representational activities (such as collective bargaining, contract administration, and grievance adjustments).

PROCESSING THIS PETITION

Elections do not necessarily occur in all cases after a petition is filed. **NO FINAL DECISIONS HAVE BEEN MADE YET** regarding the appropriateness of the proposed unit or whether an election will be held in this matter. If appropriate, the NLRB will first see if the parties will enter into an election agreement that specifies the method, date, time, and location of an election and the unit of employees eligible to vote. If the parties do not enter into an election agreement, usually a hearing is held to receive evidence on the appropriateness of the unit and other issues in dispute. After a hearing, an election may be directed by the NLRB, if appropriate.

IF AN ELECTION IS HELD, it will be conducted by the NLRB by secret ballot and Notices of Election will be posted before the election giving complete details for voting.

ELECTION RULES

The NLRB applies rules that are intended to keep its elections fair and honest and that result in a free choice. If agents of any party act in such a way as to interfere with your right to a free election, the election can be set aside by the NLRB. Where appropriate the NLRB provides other remedies, such as reinstatement for employees fired for exercising their rights, including backpay from the party responsible for their discharge.

The following are examples of conduct that interfere with employees' rights and may result in setting aside the election:

- Threatening loss of jobs or benefits by an employer or a union
- Promising or granting promotions, pay raises, or other benefits, to influence an employee's vote by a party capable of carrying out such promises
- An employer firing employees to discourage or encourage union activity or a union causing them to be fired to encourage union activity
- Making campaign speeches to assembled groups of employees on company time, where attendance is mandatory, within the 24-hour period before the polls for the election first open or, if the election is conducted by mail, from the time and date the ballots are scheduled to be sent out by the Region until the time and date set for their return
- Incitement by either an employer or a union of racial or religious prejudice by inflammatory appeals
- Threatening physical force or violence to employees by a union or an employer to influence their votes

Please be assured that IF AN ELECTION IS HELD, every effort will be made to protect your right to a free choice under the law. Improper conduct will not be permitted. All parties are expected to cooperate fully with the NLRB in maintaining basic principles of a fair election as required by law. The NLRB as an agency of the United States Government does not endorse any choice in the election.

For additional information about the processing of petitions, go to www.nlr.gov or contact the NLRB at (303)844-3551.

THIS IS AN OFFICIAL GOVERNMENT NOTICE AND MUST NOT BE DEFACED BY ANYONE. IT MUST REMAIN POSTED WITH ALL PAGES SIMULTANEOUSLY VISIBLE UNTIL REPLACED BY THE NOTICE OF ELECTION OR THE PETITION IS DISMISSED OR WITHDRAWN.



National Labor Relations Board





UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27



Opera Colorado Opera Center Employer and American Guild of Musical Artists Petitioner	Case 27-RC-319226
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NOTICE OF REPRESENTATION HEARING

The Petitioner filed the attached petition pursuant to Section 9(c) of the National Labor Relations Act. It appears that a question affecting commerce exists as to whether the employees in the unit described in the petition wish to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.


YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, a hearing will be held at 9:00 a.m. on **Friday, June 23, 2023**, and on consecutive days thereafter until concluded, by videoconference. The hearing will be conducted before a hearing officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise and give testimony.

YOU ARE FURTHER NOTIFIED that, pursuant to Section 102.63(b) of the Board's Rules and Regulations, Opera Colorado Opera Center must complete the Statement of Position and file it and all attachments with the Regional Director and serve it on the parties listed on the petition such that is received by them by no later than **noon** Mountain time on **Wednesday, June 14, 2023**. Following timely filing and service of a Statement of Position by Opera Colorado Opera Center, the Petitioner must complete its Responsive Statement of Position(s) responding to the issues raised in the Employer's and/or Union's Statement of Position and file them and all attachments with the Regional Director and serve them on the parties named in the petition such that they are received by them no later than **noon** Mountain on **Tuesday, June 20, 2023**.

Pursuant to Section 102.5 of the Board's Rules and Regulations, all documents filed in cases before the Agency must be filed by electronically submitting (E-Filing) through the Agency's website (www.nlrb.gov), unless the party filing the document does not have access to the means for filing electronically or filing electronically would impose an undue burden. Documents filed by means other than E-Filing must be accompanied by a statement explaining why the filing party does not have access to the means for filing electronically or filing electronically would impose an undue burden. Detailed instructions for using the NLRB's E-Filing system can be found in the [E-Filing System User Guide](#)

The Statement of Position and Responsive Statement of Position must be E-Filed but, unlike other E-Filed documents, must be filed by **noon** Mountain on the due date in order to be timely. If an election agreement is signed by all parties and returned to the Regional Office before the due date of the Statement of Position, the Statement of Position and Responsive Statement of Position are not required to be filed. If an election agreement is signed by all parties and returned to the Regional office after the due date of the Statement of Position but before the due date of the Responsive Statement of Position, the Responsive Statement of Position is not required to be filed.

Dated: June 2, 2023

A handwritten signature in black ink, appearing to read "Matthew Lomax", is positioned above a horizontal line.

MATTHEW S. LOMAX
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
Denver, CO 80294

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Opera Colorado Opera Center
and
American Guild of Musical Artists

CASE Case 27-RC-319226

☒ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____

Opera Colorado Opera Center

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☐ REPRESENTATIVE IS AN ATTORNEY

☒ IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

(REPRESENTATIVE INFORMATION)

NAME: <u>Leonard Segreti, Attorney</u>	
MAILING ADDRESS: <u>1700 Lincoln Street, Suite 4000, Denver, Colorado 80203</u>	
E-MAIL ADDRESS: <u>len.segreti@lewisbrisbois.com</u>	
OFFICE TELEPHONE NUMBER: <u>303-861-9771</u>	
CELL PHONE NUMBER: <u>303-870-0698</u>	FAX: <u>303-861-7767</u>
SIGNATURE: <u>/s/ Leonard Segreti</u>	
(Please sign in ink.)	
DATE: <u>6/9/2023</u>	

¹ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Opera Colorado Opera Center
and
Cohen Weiss & Simon LLP

CASE 27-RC-319226

Opera Colorado Opera Center

☒ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____
American Guild of Musical Artists


IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ REPRESENTATIVE IS AN ATTORNEY

☐ IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

(REPRESENTATIVE INFORMATION)

NAME: Megan Shaw	
MAILING ADDRESS: 900 3rd Ave. Suite 2100	
New York NY	
E-MAIL ADDRESS: mshaw@cwsny.com	
OFFICE TELEPHONE NUMBER: 2123560205	
CELL PHONE NUMBER:	FAX:
SIGNATURE: 	
DATE: Tuesday, June 20, 2023 8:03 AM Mountain Standard Time	

¹ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY. A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

Opera Colorado Opera Center
and
Cohen Weiss & Simon LLP

CASE 27-RC-319226

Opera Colorado Opera Center

☒ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☐ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____
AGMA, Petitioner


IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ REPRESENTATIVE IS AN ATTORNEY

☒ IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

(REPRESENTATIVE INFORMATION)

NAME: Sommer Omar	
MAILING ADDRESS: 900 Third Avenue 21st Floor	
New York NY	
E-MAIL ADDRESS: somar@cwsny.com	
OFFICE TELEPHONE NUMBER: 2123560271	
CELL PHONE NUMBER:	FAX:
SIGNATURE: 	
DATE: Thursday, June 22, 2023 8:53 PM Mountain Standard Time	

¹ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY. A COPY SHOULD BE SENT TO THE REGIONAL COUNSEL OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

OPERA COLORADO OPERA CENTER

Employer

and

Case 27-RC-319226

AMERICAN GUILD OF MUSICAL ARTISTS

Petitioner

ORDER REFERRING PETITION TO REVOKE TO HEARING OFFICER

A Petition to Revoke having been filed with the undersigned Regional Director on June 22, 2023 (attached), by the counsel for the Employer, Opera Colorado Opera Center, to revoke Subpoena Duces Tecum Number B-1-1J18TVH,

IT IS ORDERED pursuant to Section 102.66(f) of the Board's Rules and Regulations, that the Petition to Revoke is referred for ruling to the Hearing Officer conducting the hearing in this matter.

Dated: June 22, 2023

/s/ *Matthew S. Lomax*

MATTHEW S. LOMAX
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 27
Byron Rogers Federal Office Building
1961 Stout Street, Suite 13-103
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Attachment: Respondent's Petition to Revoke

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

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OPERA COLORADO	:	
	:	
and	:	Case No. 27-RC-319226
	:	
AMERICAN GUILD OF MUSICAL ARTISTS,	:	
AFL-CIO, Petitioner.	:	
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POST-HEARING BRIEF OF PETITIONER
AMERICAN GUILD OF MUSICAL ARTISTS, AFL-CIO

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Petitioner American Guild of Musical Artists (“AGMA” or “Union”) respectfully submits this post-hearing brief in the above-captioned representation-case proceeding. For the reasons set forth below, the Region should find that the proposed unit of workers at Opera Colorado (or the “Employer”) are an appropriate unit which includes statutory employees who share a community of interest. Accordingly, the Region should direct an election at the earliest date practicable by mail ballot pursuant to the eligibility formula established in *The Juilliard School*, 208 NLRB 153 (1974).

PRELIMINARY STATEMENT

AGMA, a labor union representing more than 6,000 employees at opera, dance, and choral companies nationwide, seeks to represent a unit of employees who work onstage and backstage on staged operatic productions presented by the Employer, Opera Colorado. Consistent with longstanding industry practice, AGMA’s petitioned-for unit includes all onstage performers, including solo singers, chorus singers, narrators, performers with speaking parts, solo and ensemble dancers, and Artists in Residence, as well as backstage stage management and stage direction, including stage managers, assistant stage managers, choreographers, stage directors, and assistant stage directors. These employees constitute a readily identifiable and functionally integrated group who work together under the Employer’s direction to bring operas to the main stage at Denver’s Ellie Caulkins Opera House. The proposed unit easily meets the test of being *an* appropriate unit. *Overnite Trans. Co.*, 322 NLRB 723, 723 (1996).

Opera Colorado seeks to exclude *all* of the proposed unit’s members on the basis that they lack a community of interest and are either independent contractors, casual employees, or not currently employed. Specifically, Opera Colorado alleges that solo singers, chorus singers, performers with speaking roles, solo and ensemble dancers, choreographers, and stage

directors are independent contractors, and assistant stage directors, stage managers, and Artists in Residence are casual employees. This is wrong. Each of these classifications work under the control and supervision of Opera Colorado's General and Artistic Director, Greg Carpenter, and its Music Director and Conductor, Ari Peltó, and each of these classifications regularly return to Opera Colorado, as is characteristic of a niche industry with a small labor pool. The Employer also emphasized that its employees all signed contracts to the effect that they were "independent contractors" or "seasonal employees." However, the text of an employer-mandated contract does not answer the question of employee status, unit placement, or voter eligibility.

At the hearing, Opera Colorado attempted to argue that assistant stage managers are casual employees, that chorus singers are volunteers, and that they have eliminated the stage manager position in favor of a fulltime, supervisory "Production Stage Manager" or "Resident Stage Manager" role which will begin work in the fall. None of these issues were raised in their Statement of Position and they are, therefore, precluded.¹ Furthermore, at the end of the first

¹ To list out in full, the following issues are precluded: (1) whether any individuals or classifications in the proposed unit are statutory supervisors, (2) whether any individuals or classifications in the proposed unit, other than Assistant Stage Directors, Stage Managers, and Artists in Residence, are casual employees, (3) whether the Stage Manager (or Production Stage Manager) classification should not be included in the unit because the Employer will eliminate that position in the future, (4) whether the future Production Stage Manager or Resident Stage Manager position is supervisory, (5) whether any individuals or classifications apart from Stage Directors, Solo Singers, Performers with Speaking Parts, Chorus Singers, Choreographers, and Solo and Ensemble Dancers are independent contractors, and (5) whether chorus singers are volunteers. 29 C.F.R. § 102.66(d); Board Exh. 3 at 5.

At the hearing, the Regional Director determined that (1) the supervisory status of the future Production Stage Manager/Resident Stage Manager position and (2) the casual employee status of the Assistant Stage Manager are precluded issues. Tr. 104-105; *see also* Tr. 316 (clarifying that the new position's title is "Resident Stage Manager"). The issue as to whether chorus singers are volunteers is discussed in Section IV(E), *infra*. The remainder of issues are evidently precluded as they were not litigated and were not included in the Hearing Officer's summary of issues at the hearing's close. Tr. 534-535; *see also* Tr. 283 (acknowledging that whether additional classifications are independent contractors is not at issue), 79 (acknowledging that

hearing day, Opera Colorado withdrew from paragraph 8 to the already-executed stipulation memorialized in Board Exhibit 2, which would have, in the event of an election, applied the special voter eligibility formula established in *The Juilliard School*, 208 NLRB 153 (1974). For the reasons discussed below, that withdrawal should not have been permitted and *The Juilliard School* is the appropriate eligibility formula here.

BACKGROUND

The Parties

AGMA is a national labor union that represents opera singers and performers, ballet and contemporary dancers, choral singers, and production staff like stage directors and stage managers working in the opera, dance, and concert-signing industries. Tr. 320. It is party to 31 collective bargaining agreements with opera companies nationwide. Tr. 324.

Opera Colorado is a non-profit opera company based in Englewood, Colorado. Board Exh. 3 at 1; Tr. 51. It presents three opera productions a year on its “mainstage,” the Ellie Caulkins Opera House in Denver. Tr. 53. Two unions already represent workers at Opera Colorado: IATSE Local No. 7 represents Opera Colorado’s stagehands and the Denver Musicians Association, an affiliate of the American Federation of Musicians, represents Opera Colorado’s orchestra. Tr. 521-522. Neither union intervened in this proceeding. Tr. 536.

Opera Colorado is run by Greg Carpenter, its General and Artistic Director, who is beholden to its Board of Directors and identified in its bylaws as Chief Executive Officer. Tr. 50, 522. As General Director, Carpenter is responsible for the “day-to-day administrative operation” of Opera Colorado. Tr. 50. As Artistic Director, Carpenter selects the repertoire and

assistant stage directors are not statutory supervisors), 84 (acknowledging that stage directors are not statutory supervisors).

particular opera productions for each season casts the performers and non-performers for the season, alongside Opera Colorado's Music Director and Conductor, Ari Peltó. Tr. 50, 147-148. Opera Colorado also employs Sahar Nouri, the Assistant Conductor or Chorus Master, Ben Karasik, the Production Manager, and Cherity Koepke, the Director of the Artists in Residence program. The parties stipulated at the hearing that Peltó, Nouri, Karasik, and Koepke are statutory supervisors. Tr. 156-157, 224, 315-316.

The Proposed Unit

The proposed unit includes all singing or speaking onstage performers and all stage direction and stage management positions at Opera Colorado: solo singers, chorus singers, performers with speaking parts, narrators, choreographers, solo and ensemble dancers, stage directors and their assistants, stage managers and their assistants, and Artists in Residence. The parties agree that Opera Colorado's box office employees, Technical Director, and Production Assistant would be excluded from the proposed unit, as well as its human resources, finance, and marketing departments and the employees already represented by IATSE Local No. 7 and the Denver Musicians Association. Tr. 524-532.

Procedural History

AGMA filed its petition on June 1, 2023. It is seeking an immediate mail-ballot election pursuant to *The Juilliard School* special voter eligibility formula. Board Exh. 1.

On June 14, 2023, the Employer filed its Statement of Position and claimed that (1) all of the classifications in the proposed unit lacked a community of interest, (2) that solo singers, chorus singers, performers with speaking parts, stage directors, choreographers, and dancers are independent contractors that cannot unionize, (3) that at the time of the filing of their Statement of Position, there were no individuals currently employed and, therefore, the petition

should be dismissed, (4) that the Employer has never hired a narrator, and (5) that assistant stage directors, stage managers, and Artists in Residence are “seasonal” employees ineligible for inclusion in a bargaining unit or to vote. Board Exh. 3 at 5. (At the hearing, the Employer clarified that by “seasonal” employees it meant “casual” employees. Tr. 17-18.) The Employer also requested a manual election on August 15, 2023.

At the hearing, the parties stipulated to AGMA’s status as a labor organization, the NLRB’s jurisdiction over the Employer, and the lack of a contract bar, among other preliminary issues. Board Exh. 2. The parties stipulated that the Employer operates seasonally with three productions scheduled for the 2023-2024 season, whose performances begin on November 4, 2023 and end on May 12, 2024. *Id.* ¶ 7. The parties also stipulated that “[i]n the event an election is directed . . . the eligibility formula to be used is the formula set forth in *The Juilliard School*, 208 NLRB 153 (1974).” *Id.* ¶ 8.

The hearing took place on June 23, 26, and 27. At the end of the first day of hearing, the Employer requested to withdraw from paragraph 8 to Board Exhibit 2, the stipulation regarding application of *The Juilliard School* formula. The Hearing Officer granted this request. AGMA filed a motion for reconsideration on June 25, which the Hearing Officer referred to the Regional Director. Tr. 263. The Employer also made an oral motion for reconsideration in response to the Hearing Officer’s determination that the issue of whether assistant stage managers are casual employees was precluded. Tr. 264. The parties requested post-hearing briefs. Tr. 542.

ARGUMENT

I. THE PROPOSED UNIT IS APPROPRIATE AND SHARES A COMMUNITY OF INTEREST

It is textbook labor law that AGMA need only show that the proposed unit is “an” appropriate bargaining unit. *American Steel Construction*, 372 NLRB No. 23, slip op. at *2 (2022) (“[i]t is elementary that more than one unit may be appropriate among the employees of a particular enterprise”) (quoting *Haag Drug Co., Inc.*, 169 NLRB 877, 877 (1968)). In determining whether a proposed unit is “an” appropriate unit, the Board asks whether the employees in the proposed unit share a community of interest, are identifiable as a group, and are sufficiently distinct. *American Steel Construction*, 372 NLRB, slip op. at 3. Unchallenged elements of this test—like, as here, whether the proposed unit is sufficiently distinct from other Opera Colorado employees—need not be litigated. *Id.* A proposed unit is “identifiable” if there is a “rational basis” for its contours and is not “clearly arbitrary.” *Id.*, slip op. at 3-4.

The traditional community-of-interest analysis examines:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer’s other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

Id., slip op. at 2 (citing *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

Here, the employer argues that none of the classifications share a community of interest with one another. Board Exh. 3 at 5. The record shows precisely the opposite.

A. The Proposed Unit is Readily Identifiable as a Group

“Readily identifiable as a group” merely means that “the description of the unit is sufficient to specify the group of employees the petitioner seeks to include.” *DPI Secuprint Inc.*,

362 NLRB 1407, fn. 10 (2015). This standard is easily satisfied here: the proposed unit consists of on-stage performers, including solo singers, chorus singers, performers with speaking parts, narrators,² solo and ensemble dancers, and Artists in Residence, and non-performers who do stage direction and stage management tasks, including stage directors, assistant stage directors, stage managers, assistant stage managers, and choreographers, all of whom work together to stage the presentation of Opera Colorado's opera productions.

B. The Workers in the Proposed Unit Share a Community of Interest

1. The Workers in the Proposed Unit are Functionally Integrated, and Have Frequent Contact with, One Another

Each of the workers in the proposed unit form one part of a larger whole: solo singers, chorus singers, performers with speaking parts, narrators, Artists in Residence, and dancers perform onstage, while stage management calls onstage performers to the wings and cues them onstage, and stage direction and choreography ensures the performers know their steps while they sing and act. They are functionally integrated, working together through rehearsals and performances to bring each opera to their audience. Each role plays a different function towards the common end of producing an opera. *DPI Secuprint, Inc.*, 362 NLRB at 1408 (“There is functional integration . . . as each handles an aspect of producing a single product.”).

Stage management and stage direction read from the same operatic score as the on-stage performers. Tr. 371-372 (assistant stage director inputs blocking into the score), 418

² In its Statement of Position, the Employer argued that it has never hired a narrator. Board Exh. 3 at 5. At the hearing, the Employer clarified that it has never hired “a narrator under a narrator contract[.]” Tr. at 107-108. However, it is undisputed that the Employer has hired workers *to be narrators*, regardless of whether their contract stated they were a “narrator.” Tr. at 108 (two solo singers narrated 2021 digital production); Tr. 193 (testifying that an Artist in Residence performed a narrator role as part of a 2022 student matinee). For this reason, it is proper for the proposed unit to include narrators.

(chorus and solo singers learn their part from the musical score), 494 (stage managers call cues from score). The assistant stage director and stage management work together during the “prep period” before rehearsals begin. Tr. 380. The stage manager and assistant stage managers work as a team, where the stage manager calls onstage artists to the wings backstage, and assistant stage managers cue each artist onstage. Tr. 485; *see also* Tr. 276 (testifying that stage manager and assistant stage managers are “all calling stage managers”). The assistant stage director may also block some scenes themselves, instead of the stage director. Tr. 386 (“we sort of split duties”).

All classifications, including onstage artists, work through staging rehearsals together in Opera Colorado’s rehearsal hall. Tr. 207, 312 (“We are all working together.”); Tr. 386-387 (describing staging rehearsals in single room where assistant stage director is “circulating” among onstage artists and stage management while the stage director works with the principal artists or group as a whole); Pet. Exh. 1 (showing Artists in Residence’s attendance at rehearsals for *Cavalleria Rusticana*, *Rigoletto*, *Die Tote Stadt*, and *Turandot*); Joint Exh. 5 (showing Artists in Residence rehearsing with chorus). Technical rehearsals then begin in the Ellie Caulkins Opera House where, once those end, the Employer presents each performance with performances by onstage artists, cuing by stage management, and blocking produced by stage direction. Tr. 380; *see also* Pet. Exh. 1. In other words, each of the classifications in the proposed unit is essential to the Employer’s presentation of opera. *See, e.g.*, Tr. 125 (testifying to need for dance or fight/intimacy choreographers at least one production a season), 127 (testifying to need for performer with speaking part in two years), 131 (testifying that Opera Colorado needs dancers on at least one production a season), 165-166 (testifying to use of performers with speaking roles), 277-278 (testifying that stage management is “mission

control”), 396 (testifying that no opera can occur without a stage director or assistant director), 450 (testifying that chorus and solo singers are essential to opera).

2. The Proposed Unit Workers Share Supervision with One Another

Carpenter testified that he has the final say over the “look” of a production and over the workplace generally, regardless of a stage director or choreographer’s wishes. Tr. 158; *see also* Tr. 169, 178-179. Carpenter may observe rehearsals at any time. Tr. 388, 504.

Customarily, he attends the “final room run” at the rehearsal hall to provide feedback on the production’s staging before technical rehearsals begin. Tr. 178-179; Tr. 388 (describing final room run in *Turandot* when Carpenter changed staging of fight sequence). Carpenter also attends technical rehearsals and performances and receives daily reports from the stage manager. He occasionally attends production meetings with stage direction and stage management if Opera Colorado’s staff asks him to be there “to arbitrate” an issue that has arisen. Tr. 179. Likewise, Carpenter intervenes in the rehearsal process if “a solo singer or stage management or our conductor comes to me with a concern about something that the director is asking somebody to do,” including safety concerns. Tr. 113.

Other individuals ensure that each production runs smoothly. The Conductor, Ari Peltó, also attends all staging and technical rehearsals. Tr. 387, 391. He ensures that the solo singers and chorus singers “are in alignment[.]” Tr. 438. He works with stage direction to manage entrances and exits. Tr. 386-387. The Production Manager, Ben Karasik, attends the “prep period” before staging rehearsals begin to run meetings, provide orientation, and explain the details of the set, costumes, and props in the production that the company chose to the assistant stage director, stage manager, and assistant stage managers in attendance. Tr. 382. The production manager (formerly, the Director of Production) also runs regular production meetings with stage direction and stage management to ensure that the technical elements of each

production are satisfactory. Tr. 382-383, 502-503; *see also* Tr. 490-491, 533 (describing duties of Katie Preissner, former Director of Production, compared to Ben Karasik, Production Manager); Pet. Exh. 41 (“Who Does What”).

Opera Colorado’s stage manager produces daily rehearsal and performance reports. Tr. 311, 495-497. These reports include details as specific as what props are needed in the rehearsal hall, how much time each scene takes to complete, and questions regarding whether specific individuals will be released from a rehearsal for a company photoshoot. *Id.*; Pet. Exh. 39 (April 22, 2022 *Carmen* rehearsal report). These reports are sent to the General and Artistic Director Greg Carpenter and the Production Manager Ben Karasik.³ Tr. 496-498. Opera Colorado’s own organizational chart shows that the “Artistic” department is supervised directly by Carpenter, while Karasik directly supervises the assistant stage director and stage management. Jt. Exh. 3. In addition to this daily supervision, the record shows that the proposed unit’s work overlaps, subjecting each role to the supervision of both Carpenter and Peltó, Opera Colorado’s Conductor.⁴ *See supra* Section I(B)(2).

3. The Proposed Unit Workers Share Skills and Training with One Another

The classifications in the proposed unit all share common skills necessary to produce opera. Performers with singing roles, stage direction, and stage management alike need a musical background to read the operatic score learn their parts or, in the case of stage direction and stage management, record in the score when and how each scene’s blocking and cues occur. Tr. 277, 370-371, 373, 386-387, 414-415, 424, 440, 494; *see also* Tr. 438, 494-495 (discussing

³ The parties stipulated that Karasik is a statutory supervisor. Tr. 315-316.

⁴ The parties stipulated that Peltó, as both Music Director and Conductor, is a statutory supervisor. Tr. 156-157.

importance of foreign languages in opera). All onstage performers, whether they have a singing or speaking role, must know how to act. Tr. 128 (comparing solo singers and performers with speaking parts); *see also* Tr. 493 (discussing casting of dancers as supernumeraries onstage). The relatively common rates of interchange between the various positions—from chorus to solo singers and assistant stage managers to stage directors—illustrate how a common body of knowledge and training undergirds this industry. *See infra* Section I(B)(4).

4. The Proposed Unit Workers Interchange Roles During Productions

The proposed unit workers’ roles do overlap during productions despite the distinct functions that each performs. In addition to filling comprimario (supporting) and chorus singer roles, Artists in Residence act as the understudies, or covers, to solo singers and step in as needed. Tr. 98-99, 101, 184-185, 449-450. Nineteen chorus singers have also performed as solo singers in the same production over the course of the past 22 productions with a chorus. Pet. Exhs. 2-25;⁵*see also* Tr. 417-418 (testifying to performing both chorus and solo work and that it is “fairly common” for chorus singers to also sing solo roles at Opera Colorado). Solo singers and Artists in Residence may act as narrators or perform spoken dialogue. Tr. 108 (testifying that two solo singers performed narration), 193 (testifying that an Artist in Residence performed narration). Solo singers and chorus singers can dance, as they did in 2022’s *Rigoletto* and *Carmen*. Tr. 175-176, 450. The stage director in 2022’s *Carmen* acted as its choreographer. Tr. 501. Assistant stage managers fill in for stage managers as needed. Tr. 502. In 2023’s

⁵ Antoine Hodge in *Rigoletto*, Benjamin Werley in *Aida*, Becky Bradley in *The Scarlett Letter*, Joshua Zabatta and Leo Kaufman in *La Fanciulla del West*, Robert Charlock in *La Boheme*, Christian Arguello, Matthew Peterson, and Zeky Nadji in *La Traviata*, Isaiah Feken and Thomas Cilluffo in *Il Barbiere del Seville*, Kendra Broom and Joseph Goodale in *Tosca*, and Joseph Goodale, Patrick Maschka, John Murray, Shane Delevan, Keith Williamson, and Phillip Lopez in *The Shining*.

Turandot, the assistant stage director and stage director “split” the blocking between them. Tr. 373. When an onstage artist is absent, the assistant stage director would perform that artist’s staging during a rehearsal. Tr. at 397. That same assistant stage director even arrived at Opera Colorado two days early to fill in for the stage manager who was out sick. Tr. 384, 397-398.

These workers’ career trajectories reflect this fluidity. Adam Da Ros, Opera Colorado’s assistant stage director for 2022’s *The Shining* and 2023’s *Turandot*, worked as a stage director in Canada and now seeks to land stage director positions in the United States. Tr. 403. However, he has previously worked as a member of a children’s chorus, supernumerary, chorus singer, assistant stage manager, pianist, and assistant conductor. Tr. 368. Both Gina Hays, Opera Colorado’s stage manager in 2022’s *Tosca* and *The Shining*, and 2023’s *Die Tote Stadt* and *Turandot*, and Sam Wheeler, AGMA’s National Executive Director, testified to the interchangeability between stage management and stage direction in the opera industry. Tr. 277, 284-285, 305-306, 336-337. *Compare* Pet. Exhs. 2-4, *with* Pet. Exh. 5-7, 10, 19 (showing over several seasons how Opera Colorado first hired Jordan Braun as an assistant stage manager and then assistant stage director).

5. The Proposed Unit Workers Share Many of the Same Terms and Conditions of Employment as One Another, Including Work Situs

All of the classifications work seasonally. Except for the Artists in Residence, who have an eight-month residency (Tr. 100-101), they all work for Opera Colorado in intermittent periods of between four and eight weeks. Tr. 63-64 (stage managers), 85-86 (assistant stage directors), 92 (assistant stage managers), 111 (stage directors), 118 (solo singers), 125 (choreographers), 135 (solo and ensemble dancers), 138 (chorus singers); *see also* Tr. 129 (noting that the same facts that apply to solo singers apply to performers with speaking parts). Each classification receives some form of travel compensation, whether in the form of airfare

and housing or a parking stipend. ER Exhs. 1-6; *see also* Tr. 162 (solo singers), 174 (dancers), 182 (choreographers), 422 (singers).

The workers in the proposed unit rehearse together in Opera Colorado's rehearsal hall, and then work on its performances at the Ellie Caulkins Opera House. Tr. 207, 380, 386-387. They all work during the same three-hour staging rehearsal sessions, technical rehearsals, and performances scheduled by Opera Colorado. Tr. 148-149, 385. They take the same breaks during rehearsals. Tr. 385-386, 440, 442-445, 495. They are all subject to the same anti-discrimination and COVID-19 workplace policies. *See, e.g.*, ER Exhs. 1-6; ER Exh. 11 at 8-13; ER Exh. 14 at 6-11; Pet. Exh. 34; Pet. Exh. 35. During the 2022-2023 season, the same personnel handbook applied to both onstage artists and production staff, which includes the Employer's anti-harassment policy and information about Pinnacol, a Colorado workmen's compensation company with whom Opera Colorado is insured for when those workers were injured "on the job." Joint Exh. 4 at 5-7.

None of the workers in the proposed unit receive a pension, any health benefits, or any form of royalty, residual, or other additional compensation for their work with Opera Colorado. Tr. 76 (assistant stage directors and stage managers), 93 (assistant stage managers), 101 (Artists in Residence), 142 (stage directors, solo singers, choreographers, dancers, performers with speaking parts, chorus singers). Although Carpenter testified that there is some variability in pay rates, the fact that there is variability is consistent between the different classifications and appears to be determined by individuals' relative bargaining power. Tr. 111, 119, 126, 133, 137 (testifying to variability in pay among stage directors, choreographers, chorus singers, solo singers, and dancers); *see also* Tr. 129 (same employment conditions for solo singers apply to performers with speaking parts). Of the compensation data that the Employer

produced, none of the positions are compensated at a livable wage. *See* ER Exh. 1 (providing 2023 production stage manager with \$8,400 for six weeks' work); ER Exh. 2 (providing 2024 assistant director with \$8,100 for six weeks' work); ER Exh. 3 (providing 2024 assistant stage manager with \$6,900 for six weeks' work); ER Exh. 4 (providing fixed fee to 2023-2024 Artists in Residence of \$15,200 for eight-month residency); ER Exh. 6 (providing chorus singer with \$500 fee per production); Tr. 137 (testifying that chorus singer fee is \$550 to \$575).

6. The Proposed Unit Composition is Consistent with Board Law and Industry Practice

Generally, units consisting of both performers and non-performers are approved in the entertainment industry. *El Mundo, Inc.*, 127 NLRB 538, 539 (1960); Outline of Law and Procedure in Representation Cases § 15-250. The Board approved a unit almost identical to the one AGMA seeks to represent here in *Metropolitan Opera Ass'n, Inc.*, 327 NLRB 740 (1999). In *Metropolitan Opera*, a group of choristers sought to sever chorus singers from a unit including solo singers, dancers, stage managers, stage directors, and choreographers. The Board affirmed the Regional Director's determination that chorus singers "share interests in common with other unit members based on their operatic skills and their indispensable role in the vocal aspects of an opera production." *Id.* at 741.

Indeed, the proposed unit here is identical, except the Artists in Residence, to a bargaining unit at Opera Colorado in the 1980s, when it bargained with AGMA as part of a multi-employer association. Pet. Exh. 28 § 1 ("Employees Covered"); Pet. Exh. 29; Tr. 339-341.

The proposed unit is also consistent with longstanding bargaining patterns in the opera industry. AGMA is the entertainment union in the United States with jurisdiction over operatic work, including onstage performers like singers and dancers and production staff like stage directors and stage managers. Tr. 320. AGMA has 31 collective bargaining agreements

with opera companies nationwide. Tr. 324. While there are over 200 opera companies in the country (Tr. 343-344), there are only 33 opera companies, including Opera Colorado, with an annual budget of at least \$3 million. *See* Opera America, ANNUAL FIELD REPORT 2022 at 10, 13, *available at* <https://www.operaamerica.org/media/gu0l3fcd/2022-annual-field-report.pdf>.

Of AGMA's 31 CBAs, 24 CBAs cover solo singers, chorus singers, stage managers and their assistants, stage directors and their assistants, performers with speaking roles and narrators, choreographers, and solo and ensemble dancers. Pet. Exh. 30; Tr. 324. Nineteen of those opera companies are among the 33 opera companies at the same or higher budget levels as Opera Colorado. *Compare* Pet. Exh. 30, *with* Opera America, ANNUAL FIELD REPORT 2022 at 10, 13. Although those 24 CBAs do not all expressly include "Young Artists" or "Apprentices" akin to Opera Colorado's Artists in Residence, such programs are a relatively recent phenomenon, and AGMA nonetheless represents those workers when they perform bargaining unit work by performing a mainstage role at signatories where they are not otherwise covered by the CBA. Tr. 324-325. These facts in conjunction reflect a strong bargaining pattern within the opera industry.

In sum, the proposed unit is readily identifiable and shares a community of interest and is therefore an appropriate unit under Board law.

II. SOLO SINGERS, CHORUS SINGERS, PERFORMERS WITH SPEAKING ROLES, STAGE DIRECTORS, CHOREOGRAPHERS, AND SOLO AND ENSEMBLE DANCERS ARE EMPLOYEES, NOT INDEPENDENT CONTRACTORS

The party challenging individual eligibility, here the Employer, bears the burden of proof to demonstrate that stage directors, solo singers, chorus singers, performers with speaking parts, choreographers, and solo and ensemble dancers are independent contractors.

MJM Studios of New York, Inc., 338 NLRB 980, 980 (2003). Opera Colorado has not met its

burden. Under the test recently established by the Board in *The Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023), the Regional Director must determine whether an individual is an independent contractor by balancing a host of factors, including whether the putative employer has the right to control the individual's work. Here, the record reflects that Greg Carpenter, the Employer's General and Artistic Director, Ari Pelto, the Conductor and Music Director, and, in the case of chorus singers, Sahar Nouri, the Chorus Master and Assistant Conductor, have the right to control—and exercise actual control over—the work of each disputed position.

A. Board Law Regarding Independent Contractor Status

The Board balances ten common-law factors to evaluate independent contractor status:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

Id., slip op. at 2 (quoting RESTATEMENT (SECOND) OF AGENCY § 220(2)). In addition, the Board determines whether the evidence tends to show that the individual is, in fact, rendering services as an independent business. *Id.*, slip op. at 12, 18. This factor considers whether the challenged positions have actual entrepreneurial opportunities in their work, including control over their schedule, a proprietary or ownership interest in their work, or compensation that fluctuates depending on the success of their work. *Id.*, slip op. at 18. As will be discussed below, the balance of factors here are indicative of employee status for the disputed positions.

Additionally, the Board has already held that *all* of the disputed positions are statutory employees, not independent contractors. In *Musical Theatre Association*, 221 NLRB 872 (1975), the Board held that the stage directors and choreographers employed intermittently by a multi-employer association's stock theatres could not be independent contractors because "these employees perform their duties under the continuous scrutiny of the producer or his representative and are subject to the producer's discretion and artistic taste[.]" *Id.* at 874 fn. 11. The Board made this determination even though the stage directors and choreographers worked for short durations and even played some role in choosing performers for productions. *Id.* at 872-874. The primary facts that animated the Board's decision were that the producers "decide[d] the specific production to be presented, set[] the budget, hire[d] the theater company, and determine[d] both the rehearsal and the performance schedule" and made final casting decisions. *Id.* at 872.

The Board has also held repeatedly that performers like singers, actors, and dancers are statutory employees. See *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763 (2011) (musicians subject to music director's right to control their performance); *American Federation of Musicians (Royal Palm Theatre)*, 275 NLRB 677, 682 (1985) (musicians subject

to music director's control "over the manner and means" of their performance); *Centerfold Club*, 370 NLRB No. 2 (2020) (affirming ALJ determination that exotic dancer is a statutory employee); *Telemundo Television Studios, LLC*, 46 NLRB Advice Mem. Rep. 30, 2017 WL 10795477 (June 13, 2017) (holding studio liable for misclassification of performers as independent contractors); *Castaways Hotel*, 250 NLRB 626 (1980) (musicians); *Colgate-Palmolive-Peet Co.*, 96 NLRB 311, 312-313 (1951) (actors, actresses, and narrators).⁶

B. Statutory Supervisors Cannot Supervise Independent Contractors, Making Solo Singers and Chorus Singers Statutory Employees

As an initial matter, statutory supervisors cannot supervise independent contractors. *See, e.g., Eugene Register Guard*, 237 NLRB 205, 206 (1978) (finding that so-called county district supervisors are statutory supervisors only if they spend a majority of their time supervising statutory employees, not independent contractors); *The Oakland Press Co.*, 249 NLRB 1081, 1082 (1980) (holding that "district managers cannot be deemed statutory supervisors" because they only supervise positions considered to be independent contractors). Here, the parties stipulated that Pelto and Nouri are statutory supervisors. Tr. 156-157. Both solo singers and chorus singers spend time in musical rehearsals with Pelto and Nouri in the lead-up to staging rehearsals, during which they receive detailed instructions on the manner of their singing that they cannot overrule. Tr. 150-152, 161, 438-441. Pelto continues to supervise the musical quality of solo and chorus singers' work during staging and technical rehearsals and

⁶ In *American Guild of Musical Artists (National Symphony Orchestra Ass'n)*, 157 NLRB 735 (1966), the Board held that two dancers were independent contractors. However, that case involved dancers who supplied their own materials, including costumes, and the symphony orchestra reserved no right to terminate their contracts before the dancers' services were completed, and exercised little, if any, control or supervision over their work. *Id.* at 741-742. As will be shown below, none of those factors are true for any of the disputed positions in this case.

performances. Tr. 444-446. Because both Peltó and Nouri are statutory supervisors, solo singers and chorus singers cannot be independent contractors as a matter of law.

C. The Disputed Positions in the Proposed Unit are Employees, Not Independent Contractors

1. Opera Colorado Exerts and Retains Significant Control over Each of the Disputed Positions

The Employer exercises substantial control over the details of the work of stage directors, solo singers, chorus singers, performers with speaking parts, choreographers, and solo and ensemble dancers. This control is clearly held with respect to singers, dancers, and performers with speaking parts, who must perform in an opera chosen by Opera Colorado and are told where, when, and how they stand, move, sit, sing, act, and dress onstage and in rehearsal. Tr. 150-152, 159, 161-162, 166-167, 169, 172-173. However, Carpenter admitted that he retains—and exercises—the right to control the minute details of stage directors and choreographers’ work as well. *See supra* Section I(B)(2).

Carpenter admitted that ultimate creative authority is vested in him as General and Artistic Director and that he has the final say over the manner and means of all of the disputed positions’ work. Tr. 113, 158-159, 166-168, 170, 173-174, 179. Although Carpenter testified that he “tr[ies] not to” exert control over stage directors (Tr. 113-114) and exerts “little to no control” over choreographers and dancers (Tr. 134), the record is clear that he has the “final say” over the manner and means of all the disputed positions’ work. As noted by the Board in *Atlanta Opera*, the relevant criterion here is an employer’s *right* to control the details of work, not just whether the employer exercises that right. *Atlanta Opera*, slip op. at 16.

Further, the record reflects that Carpenter has, in fact, exerted significant control over the details of the disputed positions’ work. He admitted that performers come to *him* if there is a concern about safety or how a production is being rehearsed and, in response, he will

intervene in how the production is being staged and overrule a stage director's blocking. Tr. 113, 158-159; *see also* Tr. 179 (testifying that Carpenter attends production meetings if his "staff comes to me and says that we've got an issue, and we need you to be there to arbitrate that issue"). During Opera Colorado's spring 2023 production of *Turandot*, for example, Carpenter ordered the stage director and fight choreographer to rework the staging of a fight scene in *Turandot* (Tr. 171, 388-389) and ordered the alteration of performers' costumes to conform to Carpenter's preference for a more formal aesthetic (Tr. 392-93). *See also* Tr. 159-160 (Carpenter ordered an entire set of costumes to be rebuilt in 2014), 392 (Carpenter gave feedback about a giant pearl set piece in *Turandot*), 493-94 (Opera Colorado failed to cast sufficient supernumeraries in accordance with stage director's vision).

Carpenter is not the only supervisor in the workplace. While Carpenter, as Artistic Director, has the final say over the "look" of each production (Tr. 179), Opera Colorado's music director and conductor, Ari Peltó, oversees the musical quality of each production. During musical rehearsals with solo singers and chorus singers, Peltó gives specific directives to ensure that performers' musical intonation, pronunciation, and style are consistent with his expectations. Tr. 152; Tr. 438-439. Opera Colorado's assistant conductor and chorus master, Sahar Nouri, similarly supervises and directs chorus singers during their musical rehearsals. Tr. 438-39. The detailed nature of Carpenter, Peltó, and Nouri's interventions, as in *Atlanta Opera*, are "indicative of the degree of control that [the opera company] 'may exercise over the details of the work' (in the words of the Restatement), even if that control is not exercised in every instance." *Atlanta Opera*, slip op. at 16.

And these interventions are not the only facts that illustrate Opera Colorado's significant control over the disputed positions' work. Opera Colorado sets the master schedule,

including the time, place, and length of rehearsals and performances. Tr. 148-149, 380, 384, 387-88, 423, 425-26, 431, 501. It determines the days when its rehearsal and performance venues are available. Tr. 149. Carpenter sets the budget. Tr. 148. Carpenter and Pelto decide the repertoire for each season, including which specific versions of each opera to produce. Tr. 147-148. Opera Colorado requires all of the disputed positions to attend rehearsals and performances. Tr. 161, 167, 173, 387-88, 420-421, 425-427, 442, 445-46; Pet. Exh. 33 (showing chorus singers must be excused from rehearsals); Pet. Exh. 37. It follows “AGMA rules” for break times and rehearsal lengths, of three-hour sessions each with at least one 10 to 15-minute break. Tr. 148-149, 495. Regardless of whether it costs more money or not, a stage director, choreographer, or any other individual at Opera Colorado must ask Carpenter for permission to hold an extra rehearsal. Tr. 154. Opera Colorado, through Carpenter, decides whether to rent or remount productions originally created by different opera companies. Tr. 154-155, 411. These decisions remove significant discretion from a stage director, especially where Opera Colorado hosts a remount, as it did in 2022’s *The Shining*, or where it rents an entire set, props, and costumes, as it did for 2023’s *Turandot*, 2022’s *Rigoletto*, and 2021’s *Tosca*. Tr. 155, 370. In other words, Opera Colorado—Carpenter and Pelto, in particular—determine the size, shape, and content of the proverbial “sandbox” in which each classification works. Tr. 308.

Finally, Opera Colorado reserves the right to terminate each of these positions’ contracts at any time. Opera Colorado’s “Standard Artist Contract,” which applies to solo singers, performers with speaking parts, stage directors, and choreographers, permits termination at will and at any time. Er. Exh. 5 at 4 (“In any event OPERA *elects* to terminate this AGREEMENT for any reason other than ARTIST’s DEFAULT”) (emphasis added); Tr. 122 (solo singer, stage director, and choreographer work is governed by Employer Exhibit 5),

129 (the same facts that apply to solo singers apply to performers with speaking parts). Likewise, although Opera Colorado’s “Contractor Agreement” for chorus singers (Er. Exh. 6) only provides Opera Colorado with the right to terminate the contract for “[c]hronic lateness, missed rehearsals, or a missed performance” (Er. Exh. 5 at 7), Carpenter testified that he has disciplined, and terminated, chorus singers for reasons other than the enumerated reasons in the contract. Tr. 236 (sexual harassment). *Cf. American Guild of Musical Artists*, 157 NLRB at 741 (finding independent contractor relationship where company did *not* retain right to terminate contracts at will). In addition to terminating one chorus singer’s contract, Carpenter also admitted that he disciplined a solo singer, and terminated their contract, when they arrived to work in 2009 “completely unprepared[.]” Tr. 236.⁷

The record reflects that Opera Colorado retains the right to, and exerts, significant control over each of the disputed positions’ work. This factor weighs heavily in favor of employee status.

2. The Disputed Positions Work in the Same Business as Opera Colorado

Solo singers, chorus singers, performers with speaking parts, stage directors, choreographers, and all dancers at Opera Colorado all work in the same niche business as Opera Colorado: **opera**. They each possess a specialized skillset for which Opera Colorado hired them: solo and chorus singers for their vocal and acting talents, performers with speaking parts

⁷ The Employer did not produce any example of a contract with a solo or ensemble dancer during the hearing. As the Employer bears the burden in this analysis, the Regional Director should make an adverse inference against the Employer that the dancer contracts permit Opera Colorado to terminate them at any time, and that they are unfavorable to the Employer. *See Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 fn. 1 (1977) (“where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him.”).

for their acting talents, stage directors and choreographers for their knowledge of how to block or stage scenes, and dancers for their dancing ability. And, as in *Atlanta Opera*, each of these classifications' work is "fully integrated into the Employer's company and productions, do not display any signifiers of engaging in an independent business, and work in tandem with the Employer's other departments," like wardrobe, sound, props, and marketing. *Atlanta Opera*, slip op. at 21; e.g., Tr. 369 (discussing how stage directors "collaborate with designers on the aesthetic elements of a production, like lighting, the sets, the costumes, the props"), 424, 447-448 (singers receive costumes, wigs, and make-up from Opera Colorado), 489-490 (discussing how prop running lists, including Pet. Exh. 40, get sent to "all the administration people at the opera" and "the heads of the departments", 499-500 (discussing how the Company requires solo singers to participate in marketing photo shoots). This factor weighs in favor of employee status.

3. Opera Colorado Directly Supervises the Disputed Positions' Work

As discussed above, Opera Colorado (through Carpenter, Pelto, and Nouri) directly supervises the work of each of these positions throughout rehearsals and performances. *See supra* Sections I(B)(2), II(C)(1). This factor weighs in favor of employee status.

4. Opera Colorado Provides the Disputed Positions with Their Tools and Places of Work

Opera Colorado provides all equipment, supplies, and workspaces necessary for each of these classifications to do their jobs. Tr. 149, 154-155, 159, 166-167, 172-174, 206-207, 393, 424-425; *see also* Tr. 129 (noting that the same facts that apply to solo singers apply to performers with speaking parts). This factor weighs in favor of employee status.

5. The Disputed Positions are Skilled but Integral to Opera Colorado's Business

Each of the disputed classifications exercise considerable skill in their jobs. Tr. 110 (stage directors), 117-118 (solo singers), 123 (choreographers), 128 (performers with

speaking parts), 131 (dancers), 139-140 (chorus singers). However, each of these roles deploy these “skills in furtherance of the Employer’s core business—staging operas” which makes them more like employees than contractors. *Atlanta Opera*, slip op. at 17. Further, unlike in *Atlanta Opera*, there is no evidence that stage directors, choreographers, dancers, and performers with speaking parts make any “personal investment[s] in training and certification,” *id.*, although there is some record evidence that solo and chorus singers may train on their own time. Tr. 331, 469. Thus, this factor is not entitled to significant weight.

6. Although The Disputed Positions’ Length of Employment is Short, They Regularly Return to Work at Opera Colorado

As in *Atlanta Opera*, the disputed positions all work for a limited duration per production at Opera Colorado. Tr. 116 (stage directors), 119 (solo singers), 125 (choreographers), 135 (solo and ensemble dancers), 138, 417 (chorus singers), 128 (performers with speaking parts). Each of these positions is free to seek opportunities with other opera companies before and after their contract with Opera Colorado. Tr. 112 (stage directors), 120 (solo singers), 124 (choreographers), 129 (performers with speaking roles), 133 (dancers), 413, 455 (chorus singers). For this reason, in *Atlanta Opera*, the Board concluded that this factor weighed in favor of independent contractor status. *Atlanta Opera*, slip op. at 17.

Unlike *Atlanta Opera*, however, there is evidence that each of these positions have a reasonable expectation of future employment with Opera Colorado. Opera is a niche field in the performing arts and, accordingly, Opera Colorado regularly rehires the same stage directors, solo singers, chorus singers, and choreographers. Pet. Exhs. 2-25;⁸ *see also* Tr. 231

⁸ Since the 2013-2014 season, 33% of all stage directors, 27% of solo singers (excluding Artists in Residence), and 88% of chorus singers (excluding Artists in Residence) hired by Opera Colorado have returned. Pet. Exhs. 2-25. The record also reflects that Carpenter primarily relies on a single dance choreographer in the Denver area, Rachael Harding, and a single fight/intimacy choreographer, Samantha Egle. Tr. 123-124; Pet. Exhs. 2-25. *See also* Pet. Exh. 32 (showing

(Opera Colorado puts favored solo singers “on hold” to rehire in the future); Tr. 115 (Opera Colorado rehires favored stage directors); Tr. 467 (chorus singer “assume[s]” he will be rehired). Carpenter also testified that his dance choreographer recommends specific dancers in the Denver area for Opera Colorado to hire. Tr. 132; *see also* Tr. 133 (noting that dancers are local to Denver). In other words, Opera Colorado hires its choreographers and dancers, a skilled profession, from a single area in Colorado. *See also Little Island*, 371 NLRB No. 80, fn. 1 (2022) (noting that the hire of stagehands in New York City was, given the narrow geographical area and specific skillset involved, from a limited labor pool suggesting a reasonable expectation of reemployment). This factor weighs in favor of employee status.

7. Opera Colorado Pays the Disputed Positions Set Rates That Provide No Entrepreneurial Opportunity for Gain or Loss

Opera Colorado pays each of the disputed positions a flat fee per production. Tr. 109-110 (stage directors), 119 (solo singers), 127 (performers with speaking roles), 132-133 (dancers), 137-138, 143 (chorus singers); Er. Exhs. 5-6. However, the record reflects that flat fees are customary in opera (Tr. 334), and none of the disputed positions receive any form of additional or changed compensation based on the critical success of a production or its ticket sales. Tr. 114 (stage directors), 119 (solo singers), 164 (chorus singers), 169 (performers with speaking roles), 174 (dancers), 182 (choreographers).

Carpenter testified that three of the disputed positions—stage directors, solo singers, and performers with speaking parts—employ agents to negotiate the fee on their behalf. Tr. 111 (stage directors), Tr. 118 (solo singers), Tr. 129 (performers with speaking roles). Carpenter also testified that four of the disputed positions—stage directors, solo singers,

that Opera Colorado offered reemployment to chorus singers at the end of the 2022-2023 season).

performers with speaking parts, and choreographers—may negotiate over their fee. Tr. 111 (stage directors), Tr. 119 (solo singers), Tr. 126 (choreographers), Tr. 129 (performers with speaking roles). Carpenter specified that these negotiations occur within “a small range” determined by Opera Colorado. *E.g.*, Tr. 111 (stage directors), Tr. 126 (choreographers).

An individual performer’s or stage director’s ability to negotiate is entirely subject to that individual’s bargaining power and has no bearing on who controls the workplace. The use of agents in the entertainment industry by statutory employees is customary, widespread, and well-documented. *See, e.g.*, Tr. 334; *H.A. Artists & Assocs., Inc. v. Actors’ Equity Ass’n*, 451 U.S. 704, 711 (1981) (“agents play an integral role in the industry; without an agent, an actor would have significantly lesser chances of gaining employment”); *Telemundo Television Studios, LLC*, 46 NLRB AMR 30, 2017 WL 10795477 (June 13, 2017) (finding misclassification even though “many” employees used agents). It is also customary in the entertainment and sports industries that the collective bargaining agreements set minimum terms, where employees are free to bargain terms above those amounts. Tr. 334-335; *see also* *Castaways Hotel*, 250 NLRB 626, 640 fn. 21 (1980) (noting that “[w]here a musician’s particular ability warranted, a negotiated overscale rate was expressly stated”); *Musicians, Local 368*, 170 NLRB 271 (1968) (noting that club could pay musicians overscale). These facts do not turn these employees into independent contractors.

In any event, it is not even uniform at Opera Colorado that individuals try to bargain higher rates. Zabatta testified that he did not negotiate about the terms and conditions of his employment as a solo singer, and that he was paid only \$100 per performance for his role as a solo singer in Opera Colorado’s 2016 production of *La Fanciulla del West*. Tr. 452; Pet. Exh. 25. The purpose of the National Labor Relations Act is to *regulate* the bargaining power

between employers and employees. 29 U.S.C. § 151 (the Act responds to “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association”). It would be contrary to the purposes of the Act to conclude from the fact that *some* individuals are able to negotiate their rates or have agents that, as a result, an entire classification of work lacks statutory employee status.

Given the special circumstances posed by the entertainment industry, this factor is inconclusive as to whether it weighs towards employee status or not.

8. The Disputed Positions’ Work is Wholly Integrated into the Regular Business of Opera Colorado

As in *Atlanta Opera*, the Employer’s regular business is to stage live operas. Tr. 50-51. An opera without vocals from solo singers and chorus singers, blocking from stage directors and choreographers, or dance where required, is unimaginable. *See also supra* Section I(B)(1). This factor weighs in favor of employee status. Indeed, the disputed positions’ work here is even more central to the Employer’s operations than the stylists’ work in *Atlanta Opera*. *Cf. Atlanta Opera*, slip op. at 18 (“If anything, stylists’ contributions are more central here, *as they work directly with the onstage performers.*”) (emphasis added).

9. The Parties’ Belief About the Relationship They Create is Inconclusive

Opera Colorado has deliberately structured its relationship with its solo singers, chorus singers, stage directors, choreographers, and dancers so as to make it appear—and try to make them believe—that they are independent contractors with no rights under the Act. This approach is at odds with the industry practice of recognizing these performers and non-performers as statutory employees with the right to bargain collectively. *See also supra* Section I(B)(6) (discussing predominance of CBAs in opera). In fact, the General Counsel has recently

suggested that such misclassification is in and of itself an unfair labor practice that she will seek to enforce in the appropriate case. MEMORANDUM GC 21-04 (Aug. 12, 2021) (requesting that all cases involving the applicability of *Velox Enterprises, Inc.*, 368 NLRB No. 61 (2019), be submitted to the Division of Advice); *see also Telemundo Television Studios, LLC*, 46 NLRB Advice Mem. Rep. 30, 2017 WL 10795477 (June 13, 2017).

The Employer emphasized throughout the hearing that each of the disputed positions' written contracts state that they are independent contractors. *See, e.g.*, Tr. 110, 122, 126, 131, 134, 139; Er. Exhs. 5-6. However, the mere existence of written provisos like those at Opera Colorado—even if they were reviewed by an agent—is insufficient to establish a mutual belief that the parties entered an independent contractor relationship. *FedEx Home Delivery*, 361 NLRB 610, 623 (2014); *see also Telemundo Television Studios, LLC*, 46 NLRB AMR 30, 2017 WL 10795477 (June 13, 2017) (finding misclassification despite written contracts stating that the performers are independent contractors where “many” employees had agents); *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1762 (2011) (reversing Regional Director determination that musicians were independent contractors which relied, in part, on the fact that musicians entered into independent contractor agreements); *Tribune Co.*, 279 NLRB 977 (1986) (affirming ALJ's conclusion that the fact that drivers were party to an “Independent Contractor Agreement” did not determine result of the analysis); *News-Journal Co.*, 180 NLRB 864, 867 (1970) (“the express provisions of the contracts purporting to create independent contractor relationship notwithstanding . . . the practice of the parties shows that the deliverers do not act as independent contractors”).

The record is clear that if any one of the disputed provisions refused to sign the contract drafted by Opera Colorado, they would not be permitted to perform work for Opera

Colorado. Tr. 142 (testifying that none of the disputed classifications “provide services to Opera Colorado without an independent contractor agreement executed”). This fact alone is sufficient to conclude that the significance of these written contracts is slight. *Crew One Productions, Inc.*, Case 10-RC-124620, 2014 WL 4161757 (NLRB Aug. 21, 2014) (unpublished) (noting that the Regional Director “simply found that [the written contracts’] potential significance was undercut by the fact that they apparently were mandated by the Employer”).

Carpenter also gave vague testimony that Opera Colorado is “starting to see a little bit more” of solo singers requesting to be paid through an LLC (Tr. 124-125), and that no individual has ever requested to be paid as a W-2 employee, rather than a 1099 contractor. Tr. 57, 112, 119, 133. Sam Wheeler, National Executive Director of AGMA, explained why some solo singers, given their high expenses and intermittent employment patterns, may want payment through these arrangements because W-2 employees are no longer permitted to deduct business expenses, a fact which is distinguishable from how their work is structured in the workplace. Tr. 331-32. The record is unclear, however, as to how many solo singers at Opera Colorado even use such arrangements. *See also XPO Cartage, Inc.*, Case 21-CA-150873, 2018 WL 4357749 (NLRB Div. of Judges Sept. 12, 2018) (concluding that employees were misclassified where they were required to enter into independent contractor agreements and where “a small number of the drivers . . . are incorporated”). Further, the fact that an individual wants to be classified as an independent contractor is simply not one of the factors used to determine whether they are independent contractors under the NLRA. *See, e.g., SOS Int’l, LLC*, Case 21-CA-178096, 2018 WL 1292639 at fn. 9 (NLRB Div. of Judges, Mar. 12, 2018) (finding that workers are statutory employees even though one witness “testified, without contradiction” that they wanted to be independent contractors).

The record is also inconclusive as to what individual workers believe their relationship with Opera Colorado to be. For example, Joshua Zabatta, a solo and chorus singer, testified that he thinks that he is “currently employed” by Opera Colorado, even though Opera Colorado is currently in the off-season and he has signed at least three agreements stating that he is an independent contractor. Tr. 415; Er. Exhs. 15-17. In addition, the record reflects that Opera Colorado invests in Pinnacol, a Colorado workmen’s compensation company, to provide artists and production staff compensation if injured “on the job.” Joint Exh. 4.

Therefore, for the reasons discussed above, this factor is inconclusive.

10. Opera Colorado is in the Business of Producing and Present Operas

The Employer is in the business of presenting operas. Tr. 50-51. The disputed positions’ work is essential to that business. *See supra* Section I(B)(1). This factor weighs in favor of employee status.

D. The Evidence Tends to Show that the Disputed Classifications Render Services as Employees, Not Independent Contractors

As set forth above, seven of the ten factors in the common-law test under *Atlanta Opera* weigh in favor of the disputed positions’ status as statutory employees. The balance of evidence also shows that these positions render services as employees. As noted above, Opera Colorado controls their schedule. Tr. 148-149. Although each of the positions can take other jobs outside of the time in which they are expected to rehearse or perform for Opera Colorado (Tr. 114 (stage directors), 119 (solo singers), 124 (choreographers), 129 (performers with speaking roles), 133 (dancers), 436-437 (chorus singers)), they cannot negotiate fees that fluctuate based on the success of a performance. Tr. 114 (stage directors), 119 (solo singers), 138, 164 (chorus singers), 168-169 (performers with speaking roles), 174 (dancers), 182 (choreographers). Further, they have no proprietary right to their work at Opera Colorado. Tr.

162-163 (solo singers), 164 (chorus singers), 168-169 (performers with speaking parts), 174 (dancers), 180 (stage directors),⁹ 182 (choreographers). They cannot sell or subcontract their position. Tr. 162 (solo singers), 164 (chorus singers), 168 (performers with speaking parts), 174 (dancers), 180 (stage directors), 182 (choreographers). And they have no control over any business decisions, from hiring, firing, and discipline to the allocation of labor or commitment of capital to a production. Tr. 162-165, 168-169, 174, 180-182. Finally, as in *Atlanta Opera*, “the primary reason that [the disputed positions] work for multiple employers is the fact that the Employer’s productions occur on a seasonal and intermittent basis, making exclusive employment with the Employer unrealistic.” *Atlanta Opera*, slip op. at 18-19.

In sum, the evidence is abundantly clear that solo singers, chorus singers, performers with speaking roles, stage directors, choreographers, and dancers are employees and that Opera Colorado has misclassified them as independent contractors.

III. CASUAL EMPLOYEE STATUS AND THE APPLICABILITY OF THE JUILLIARD SCHOOL FORMULA

Opera Colorado also contends that assistant stage directors, stage managers, and Artists in Residence are casual employees and, therefore, neither eligible to vote nor appropriate for inclusion in a bargaining unit. Board Exh. 3 at 5. It also argues in its Statement of Position that no individuals were employed at the time that the petition was filed and, as a result, no individuals would be eligible to vote in the election and the petition should be dismissed. *Id.* Finally, it argued at the hearing that it should be permitted to withdraw from paragraph 8 of Board Exhibit 2, part of the parties’ written stipulation from the hearing, which stated that, “In

⁹ Carpenter testified that some stage directors may contract for a “right of first refusal” on a new production that they blocked themselves at the next opera company that rents or buys the rights to that production. Tr. 180. A right of first refusal is not an ownership right or property, but a right to be offered future employment. Tr. 323-324.

the event an election is directed, the parties agree that the eligibility formula to be used is the formula set forth in *The Juilliard School*, 208 NLRB 153 (1974).” Board Exh. 2 ¶ 8; *see also* Tr. 238-241. As the party asserting ineligibility, Opera Colorado bears the burden of proof on each of these issues. *Sweetener Supply Corp.*, 349 NLRB 1122 (2007).

We address each of these arguments in the sections below; but in sum, they are all wrong. First, in an industry with an intermittent employment pattern like opera, the measure of whether assistant stage directors, stage managers, and Artists in Residence are casual employees turns on the regularity of employees’ work as measured by a special voter eligibility formula. *Kansas City Repertory Theatre*, 356 NLRB 147 (2010) (applying *Juilliard* formula to measure employees’ casualness in entertainment); *see generally Trump Taj Mahal Associates*, 306 NLRB 294, 295 (1992) (applying *Davison-Paxon* eligibility formula to measure employees’ casualness); *Post Houses, Inc.*, 161 NLRB 1159, 1172 (1966) (“unit placement and voting eligibility [are] inseparable issues”). Second, the correct voter eligibility formula in this case is the formula set forth in *The Juilliard School*, which will enfranchise five assistant stage directors, four stage managers, and twelve Artists in Residence from the last two seasons. This fact alone demonstrates that these classifications are *not* casual employees. Third, units comprised of only seasonal employees are appropriate. *Bogus Basin Recreation Assn*, 212 NLRB 833 (1974). The use of a special voter eligibility formula, given this industry’s employment patterns, will enfranchise individuals from each of the classifications in the proposed unit. *Cf. Foreign Car Ctr., Inc.*, 129 NLRB 319, 320 (1960) (refusing to certify one-person bargaining unit).

Finally, the Hearing Officer should not have permitted Opera Colorado to withdraw from a stipulation as to the correct voter eligibility formula in this case because the Employer’s reasoning for the withdrawal was premised upon a precluded issue. The Employer

argued for permission to withdraw from the stipulation because the Employer wants to argue that *all* classifications (not just assistant stage directors, stage managers, and Artists in Residence) are casual employees. This argument is, however, precluded: the Employer only claimed that assistant stage directors, stage managers, and Artists in Residence are casual (or, “seasonal”) employees in its Statement of Position. Board Exh. 3 at 5.

A. The Juilliard School Formula Determines Both Voting Eligibility and Unit Inclusion

A “casual” employee is a part-time employee whose work with the employer is irregular and, therefore, may not be eligible to vote or become a unit member. *See* NLRB Outline of Law and Procedure in Representation Cases § 20-140. The measure of whether an employee is casual turns on “such factors as regularity and continuity of employment, length of employment, and similarity of work duties” to regular employees. *Pat’s Blue Ribbons*, 286 NLRB 918 (1987). In this case, the Employer contends that Assistant Stage Directors, Stage Managers, and Artists in Residence are casual employees, not seasonal employees. Tr. 534.

Absent special circumstances, the Board applies the voter eligibility formula devised in *Davison-Paxon Co.*, 185 NLRB 21 (1970), to evaluate whether a casual employee worked a sufficient number of hours with sufficient regularity to share a “real continuing interest in the terms and conditions of employment offered by the employer” by determining whether individuals average four hours or more of work per week for the last quarter prior to the eligibility date. *Columbus Symphony Orchestra*, 350 NLRB 523, 524 (2007) (quoting *Trump Taj Mahal Casino*, 306 NLRB 294, 296 (1992)). However, special circumstances, and therefore alternate voter eligibility formulas, frequently apply in industries like entertainment and construction, where employment is characteristically intermittent. *Kansas City Repertory Theatre*, 356 NLRB 147, 147 (2010) (entertainment); *Steiny & Co., Inc.*, 308 NLRB 1323, 1325

(1992) (construction); *Greenhorne & O'Mara, Inc.*, 326 NLRB 514, 516 (1998) (archaeological digs). The Board explicitly recognized in *Kansas City Repertory Theatre* that “in many industries employees with *little or no* expectation of continued employment with a particular employer engage in stable and successful collective bargaining—for example, actors and construction workers[.]” 356 NLRB at 147.

The special voter eligibility formula established in *The Juilliard School*, 208 NLRB 153 (1974), commonly applies to bargaining units in the entertainment industry. *See, e.g., Kansas City Repertory Theatre*, 356 NLRB at 147; Decision and Direction of Election, *Atlanta Opera, Inc.*, Case 10-RC-276292 (June 17, 2021); Decision and Direction of Election, *TZ Chicago LLC*, Case 13-RC-256049 (February 25, 2020); Decision and Direction of Election, *Piano Symphony Orchestra*, Case 16-RC-10844 (May 30, 2008); Decision and Direction of Election, *Charleston Symphony Orchestra*, Case 10-RD-102923 (June 10, 2013). This formula enfranchises individuals who work during two productions for a total of five working days over a one-year period, or who have been employed at least fifteen days over a two-year period. There are two important considerations for determining whether the *Juilliard School* formula, rather than *Davison-Paxon*, 185 NLRB 21 (1970), applies: (1) the length and number of productions hosted by the Employer and (2) the extent to which the Employer relies on the work performed by the classifications in the proposed unit. *Juilliard School*, 208 NLRB at 155. For example, in *Kansas City Repertory Theatre*, the Regional Director applied these factors to conclude that the *Juilliard School* formula should apply to an employer who presents seven to eight productions (25 to 40 performances) each season, and who consistently relies upon workers in the proposed unit. 356 NLRB at 150.

In *Columbus Symphony Orchestra*, 350 NLRB 523, 524 (2007), and *Steppenwolf Theatre Co.*, 342 NLRB 69, 71 (2004), these *Juilliard School* factors were not satisfied and the Board applied the *Davison-Paxon* formula instead. Unlike the “relatively few” productions in *Juilliard* which ran for “three or four performances at the most,” 208 NLRB at 154, in *Columbus Symphony*, the employer hired a large, full-time, non-seasonal workforce alongside occasional part-time employees for over 170 performances a year. 350 NLRB at 523, 525. In *Steppenwolf Theatre*, the employer presented 14 productions with over 500 performances year-round and relied heavily on regular full-time employees. 342 NLRB at 71-72. This meant that the *Davison-Paxon* formula was sufficient to enfranchise members of the proposed unit. *See also N.L.R.B. v. Wang Theatre, Inc.*, 981 F.3d 108, 116 (1st Cir. 2020) (disagreeing with Regional Director’s decision to apply *Juilliard School* formula because Regional Director failed to consider the number of relevant productions and the extent to which employer relied upon the work in the proposed unit).

At Opera Colorado, by contrast, there are only three mainstage productions per year, in addition to eight touring production performances in which only the Artists in Residence perform. Board Exh. 2 ¶ 7; Tr. 53, 191; Pet. Exh. 1 (2023-2023 Artists in Residence calendar showing eight touring production performances). Staging and technical rehearsals, where each of the job classifications in the proposed unit work together simultaneously, last about four weeks; four or five performances are then held for about a week at the end of the rehearsal period. Tr. 64; *e.g.*, Pet. Exh. 21 (showing four performance dates from November 5-13, 2022 for Opera Colorado’s *Rigoletto*). Although the Employer recalls a significant number of all employees in the proposed unit, they do not work on each of the three mainstage productions a year. *See supra* fn. 8 and accompanying text (discussing recurrence rates of unit employees

between 33% and 88% depending on classification); *see also infra* Section III(B)-(C) (discussing annual rehire rates of unit employees of between 27% and 67% depending on classification); Pet. Exhs. 2-25. Further, the record is clear that the Employer wholly relies on the intermittent work of the employees in the proposed unit. *See supra* Section I(B)(1); Jt. Exh. 3 (showing reliance in Employer’s organizational chart on workers in the proposed unit). These facts mean that application of the *Davison-Paxon* formula, which only makes individuals eligible who worked during the last three months before the eligibility date, would not sufficiently enfranchise workers with a reasonable expectancy of future employment with Opera Colorado.

At the hearing, the Employer emphasized that unit employees have the right to turn down jobs with the Employer and that there is no explicit guarantee of reemployment after one job finishes and before the next job begins. *See, e.g.*, Tr. 141, 302-303, 398-399. This is irrelevant. The Board clearly held in *Mid-Jefferson County Hospital*, 259 NLRB 831 (1981), that the fact that workers can reject work offers does not determine whether they are casual employees. The Employer also argued that each category of employee signed contracts to the effect that they are “seasonal” employees. *See, e.g.*, Tr. 297, 401. As is clear from the factors above, this fact lends no weight to this analysis.

For the reasons discussed, the *Juilliard School* formula is appropriate to determine whether workers in the proposed unit are casual employees, and to evaluate voter eligibility in the event that the Region directs an election.

B. Assistant Stage Directors, Stage Managers, and Artists in Residence are Not Casual Employees

As established above, the applicable special voter eligibility formula determines whether specific classifications are casual employees under the Act. *Trump Taj Mahal*, 306 NLRB at 296 (“[i]n *Juilliard*, the Board determined that ‘casual’ employees who would not have

been eligible under a standard formula worked on a repetitive basis and had a continuing interest in employment. Therefore, the Board devised an inclusive—not exclusive—eligibility formula to permit optimum employee enfranchisement and free choice[.]”). Given that *The Juilliard School* formula is appropriate here, the record reflects that the three classifications that Opera Colorado contends are casual—assistant stage directors, stage managers, and Artists in Residence—are, in fact, regular employees entitled to vote and be included in the unit. Specifically, *The Juilliard School* formula would enfranchise five assistant stage directors, four stage managers, and twelve Artists in Residence. Tr. 63-64, 85-86, 100-101 (testifying to the duration of assistant stage directors, stage managers, and Artists in Residence’s work); Pet. Exhs. 18 (2021’s *Tosca*), 19 (2022’s *Carmen*), 20 (2022’s *Cavalleria Rusticana*), 21 (2022’s *Rigoletto*), 22 (2022’s *The Shining*), 23 (2023’s *Die Tote Stadt*), 24 (2023’s *Turandot*).

In contrast to its “casual” employee analysis, the Board may also determine if “seasonal” employees have some reasonable expectation of future employment and are therefore eligible to vote by considering (1) the size of the labor pool, including whether the employer hires for a niche field, (2) the extent of the employer’s dependence upon the seasonal work at issue, and (3) whether there is evidence of a recall policy or a historical rate of reemployment. *Little Island*, 371 NLRB No. 80 (2022) (holding that first season of summer employees could vote in election because of their niche stagehand occupation, the employer’s dependence on their work, and some evidence that the employer intended to recall them the next summer); NLRB Outline of Law and Procedure in Representation Cases § 20-300.

Even if the Region reaches this issue, the record reflects that each classification satisfies the test to determine whether they have some reasonable expectation of future employment. Although Opera Colorado hires nationwide, it hires from a small labor pool of

individuals with experience in opera production or performance, as in *Little Island*. See, e.g., Tr. 336 (testifying that there are just under 600 stage directors, assistant stage directors, stage managers, and assistant stage managers nationwide who are members of AGMA), 361 (“there is a minimum competency threshold that is very high that you have to clear to work on any of these stages”). Second, Opera Colorado heavily relies on all three positions’ work. Without assistant stage directors, there could be no stage direction during performances after opening night. E.g., Tr. 86, 396. Without stage managers, there could be no calling of cues during a show, organization of props and costumes, or the keeping of time. Tr. 277-278, 485-486, 495-496; see also Pet. Exh. 40. And without Artists in Residence, small supporting roles in the mainstage productions would be unfilled and the touring productions around Colorado that Opera Colorado prides itself upon could not occur. Tr. 98-99, 101, 185-186, 191. Indeed, Opera Colorado’s own organizational chart demonstrates each of these classifications’ indispensability. See Joint Exh. 3.

Finally, the record reflects that all three positions have significant rates of rehire both season-to-season and over longer time periods. Since the 2013-2014 season, approximately 42% of each year’s assistant stage directors get rehired the next year. See Pet. Exh. 2-25. During that entire period, only 12 assistant stage directors worked the 21 Opera Colorado productions that required an assistant stage director (i.e., 57% of all assistant stage directors returned to Opera Colorado). *Id.*¹⁰ Likewise, since the 2013-2014 season, approximately 20% of Artists in Residence return to Opera Colorado the next year. *Id.*;¹¹ see also *Artist in Residence*

¹⁰ Dan Wallace Miller, Heather Romig, Joel Atella, Jordan Braun, Julia Hoch, Eve Summer, Audrey Chait, Frances Rabelais, Colter Schoenfish, Adam Da Ros, Ian Silverman, Daniel Seth

¹¹ Brett Sprague, Danielle Lombardi, Charles Eaton, Nicholas Kreider, Kira Dills-DeSurra, Eric McConnell, Isaiah Feken, Catherine Swindle, Kendra Broom, Thomas Lynch. Dills-

Program, OPERA COLORADO, available at <https://www.operacolorado.org/education/artist-in-residence-program/> (listing past Artists in Residence).

Stage managers have an even higher rate of return. From the 2013-2014 season through the 2017-2018 season, Opera Colorado's Director of Production, Katie Preissner, served as its resident stage manager. Pet. Exhs. 2-25. Since the 2018-2019 season, twelve Opera Colorado productions required a stage manager, but only seven stage managers have worked in that role, amounting to an average season-to-season rehire rate of about 27%, and a total recurrence rate of approximately 58%. Pet Exhs. 2-25.¹²

In other words, assistant stage managers, stage managers, and Artists in Residence are *not* casual employees but are seasonal employees with some reasonable expectation of reemployment at Opera Colorado.

C. The Employer is Precluded from Arguing that Assistant Stage Managers, or Any Other Classification, are Casual Employees

The Employer did not allege in its Statement of Position that Assistant Stage Managers—nor any other classifications apart from Assistant Stage Directors, Stage Managers, and Artists in Residence—are casual employees. Board Exh. 3 at 5. The Employer had the opportunity to list “Assistant Stage Managers,” as the Employer’s catalogue of alleged independent contractors included “Stage Directors,” while its catalogue of so-called seasonal¹³ employees included “Assistant Stage Directors.” *Id.* Board preclusion thus applies, and the

DeSurra returned to Opera Colorado a second time to perform as a solo singer in *Cavalleria Rusticana*. Pet. Exh. 20 at 6.

¹² Stephanie Canada, Katie Preissner, Amelia Nordin, Gina Hays, Rachel Henneberry, Brett Finley, Kendra Green.

¹³ The Employer clarified that by “seasonal,” it meant “casual.” Tr. 17-18.

Hearing Officer correctly determined that the Employer may not argue that Assistant Stage Managers are casual employees. Tr. 104-105; 29 C.F.R. § 102.66(d); see *Manor Care of Yeadon Pa, LLC*, 368 NLRB No. 28, slip op. at 1 fn.4 (July 25, 2019) (affirming the Regional Director’s finding that “the Employer failed to identify in its Statement of Position those classifications of employees that it sought to include in the petitioned-for unit and thus waived its right to argue that the only appropriate unit is one that includes additional classifications”).

Furthermore, even if the Regional Director permits the Employer to make such an argument, the record shows that Assistant Stage Managers are not casual employees. Under the *Juilliard School* formula, approximately seven Assistant Stage Managers would be enfranchised. Pet. Exhs. 18 (2021’s *Tosca*), 19 (2022’s *Carmen*), 20 (2022’s *Cavalleria Rusticana*), 21 (2022’s *Rigoletto*), 22 (2022’s *The Shining*), 23 (2023’s *Die Tote Stadt*), 24 (2023’s *Turandot*). And, if the Regional Director decides to reach the question of whether they are seasonal employees with some reasonable expectation of reemployment, as in *Little Island*, the size of the labor pool, the centrality of this position to the Employer’s operations, and the historical rate of reemployment all show that the Assistant Stage Managers are not casual seasonal employees. Carpenter himself admitted that Opera Colorado struggles to hire assistant stage managers. Tr. 94. This role is essential; without assistant stage managers on both sides of the stage, onstage artists would miss their cues. Tr. 485. Finally, Opera Colorado rehires an average of 67% of its assistant stage managers from its previous season each year. Pet. Exhs. 2-25.¹⁴

¹⁴ Jordan Braun, Sarah Johnson, Vanessa Chumbley, Amelia Nordin, Sara Sachs, Madeline Levy, Jaclyn Fulton, Kristin Kelley, Marcie Friedman, Lexi Holtzer, Miranda Wilson, Laurel McIntyre, Megan Coutts, Colleen Kane, Adrienne Bader, Lucy Guillemette.

D. The Employer is Precluded from Withdrawing from Board Exhibit 2, Paragraph 8

At the opening of the hearing, the parties stipulated to Board Exhibit 2. Tr. 11-12; Board Exh. 2. Paragraph 8 of this Board Exhibit states: “In the event an election is directed, the parties agree that the eligibility formula to be used is the formula set forth in *The Juilliard School*, 208 NLRB 153 (1974).” Both parties executed this stipulation. See Board Exh. 2. Before the end of that same day, the Employer objected to this stipulation and requested permission to withdraw. Tr. 238-241. The Employer’s objection, however, was premised on the idea that the parties would be litigating a precluded issue: whether all of the classifications *other* than assistant stage directors, stage managers, and Artists in Residence are casual employees. *Id.* (responding “[t]hat’s right” to Hearing Officer’s question, “if . . . the purported independent contractors are found to be employees, [the Employer’s position is that] they are ineligible nonetheless, because they’re casual employees with no expectation of recall”).

Once a stipulation has been approved, a party may withdraw only by agreement or by showing unusual circumstances. *Hampton Inn & Suites*, 331 NLRB 238 (2000). As the basis of the Employer’s objection was precluded, the Employer should not have been permitted to withdraw from paragraph 8 of Board Exhibit 2. See also *K & N Engineering*, 365 NLRB No. 141 (2017) (preventing employer from withdrawing from stipulation to inclusion of janitors in a unit of production employees).

The Regional Director should grant the Petitioner’s motion for reconsideration of the Hearing Officer’s decision to permit the Employer to withdraw from Board Exhibit 2, paragraph 8.

E. The Employer is Precluded from Arguing that Chorus Singers are Volunteers

At the hearing, the Employer argued that chorus singers are volunteers, not statutory employees, and that the Union's attempt to represent chorus singers would "end community theater." Tr. 226-227. The Employer's argument rests on three factual claims: (1) Opera Colorado pays its chorus singers very little, about \$550 as a "flat fee" (Tr. 137), (2) Opera Colorado's chorus singers likely must rely on some other source of compensation in order to make a living (Tr. 138), and (3) the Employer's administrative staff allegedly refers to chorus singers as the "volunteer chorus" (Tr. 141-142).¹⁵ This argument is both precluded and contrary to Board precedent.

The Employer did not raise this argument in its Statement of Position, or even at the opening of the hearing. Therefore, any argument regarding the so-called "volunteer" status of chorus singers is precluded. 29 C.F.R. § 102.66(d).

Nonetheless, Board precedent holds that operatic chorus singers like those in the proposed unit here are not volunteers. In *Seattle Opera Association*, 331 NLRB 1072 (2000), the Board held that auxiliary chorus singers who received only \$214 for each operatic production were statutory employees, not volunteers. The Board noted that the auxiliary choristers were paid some form of monetary remuneration, were required to attend rehearsals on time, received workplace policies, and were essential to the Employer's operations. *Id.* at 1073-1074. These

¹⁵ This final allegation about how Opera Colorado's administrative staff refer to chorus singers is hearsay, insofar as it is an uncorroborated out-of-hearing statement offered for the truth of the matter asserted, and irrelevant, insofar as it shows only how Opera Colorado's administrative staff, and not the workers in the proposed unit, view chorus singers. The Regional Director must therefore afford the testimony no weight. Fed. R. Evid. 802; *Sears, Roebuck & Co.*, 368 NLRB No. 30 (July 30, 2019) (affirming ALJ's refusal to grant any weight to uncorroborated hearsay testimony).

facts are all true here. Tr. 137, 150-151, 427; Pet. Exhs. 34-38 (chorus singer contract with attached workplace policies); Tr. 450 (testifying that chorus singers are essential to opera).

As the Board noted, “to find individuals not to be employees because they are compensated at less than the minimum wage, or because their compensation is less than a living wage, contravenes the stated principles of the Act.” *Seattle Opera Ass’n*, 331 NLRB at 1074. Likewise, to suggest that workers who need to work multiple jobs to make a living may not unionize at one or more of those jobs would have a far more damaging effect on the Act’s purpose to rectify inequalities in bargaining power between employees and employers than some invented danger that community theater will somehow be abolished.

IV. THE REGION SHOULD DIRECT A MAIL-BALLOT ELECTION IN THE OFF-SEASON PURSUANT TO THE *JUILLIARD* ELIGIBILITY FORMULA

Elections must occur at “the earliest date practicable.” 29 C.F.R. § 102.67(b).

The premise of this principle is that expeditious elections promote labor peace, vindicate employees’ Section 7 rights to join a union and bargain collectively, prevent workers’ feelings of futility and, as a result, increase voter turnout. Representation-Case Procedures, 79 Fed. Reg. 74,405, 74,316 (Dec. 15, 2014). Indeed, the Act’s longstanding policy is to “expeditiously resolv[e] questions concerning representation[.]” *Manhattan Ctr. Studios, Inc.*, 357 NLRB 1677, 1682 (2011) (quoting *Northeastern University*, 261 NLRB 1001, 1002 (1982)).

However, the Region may direct an immediate election for seasonal employees where circumstances warrant. Such circumstances include a high return rate among the proposed unit year-after-year and the applicability of a voter eligibility formula and election method that will ensure enfranchisement. See, e.g., *Penn. Interscholastic Athletic Ass’n, Inc.*, No. 06-RC-152861, 2016 WL 1086681, at *1, n.1 (Mar. 21, 2016) (denying review of Regional Director’s decision to order off-season election for lacrosse officials); see also *Sitka Sound Seafoods, Inc.*,

325 NLRB 685 (1998), enfd. 206 F.3d 1175 (D.C. Cir. 2000) (regional director properly scheduled winter election using eligibility formula to allow seasonal summer employees to vote by mail ballot); *Aspen Skiing Corp.*, 143 NLRB 707, 711 (1964) (directing July election even where ski season did not begin until November based on high reemployment rate of winter employees). Here, the circumstances warrant such an immediate election because approximately 40% of the proposed unit return to work with the Employer each year (including from before the COVID-19 pandemic to the 2021-2022 season) and use of both the *Juilliard School* voter eligibility formula and a mail-ballot election will maximize enfranchisement. *See, e.g.*, Pet. Exhs. 14 (2019’s *Il Barbiere del Seville*), 16 (2020’s *Pagliacci*), 18 (2021’s *Tosca*), 19 (2022’s *Carmen*), 20 (2022’s *Cavalleria Rusticana*), 21 (2022’s *Rigoletto*), 22 (2022’s *The Shining*), 23 (2023’s *Die Tote Stadt*), 24 (2023’s *Turandot*).

The Employer itself elicited testimony to the effect that wide swathes of the proposed unit—stage directors, assistant stage directors, stage managers, assistant stage managers, Artists in Residence, solo singers, and performers with speaking parts—do not live in Colorado. *See, e.g.*, Tr. 86-87, 90, 93, 111, 120-121. Eligible voters in the proposed unit are scattered throughout the United States. This makes a mail-ballot election appropriate and necessary under the circumstances. *San Diego Gas*, 325 NLRB 1143, 1145 (1998).

However, if, for whatever reason, the Region decides to order an election pursuant to any voter eligibility formula other than *The Juilliard School* formula—like, for instance, the formula established in *Davison-Paxon Co.*, 185 NLRB 21 (1970)—then the Region should order the election at the peak of the Employer’s season. Ordinarily, when employment patterns are not as unusual as they are in this particular industry, Regions order elections for seasonal bargaining units at the peak of the season. NLRB Outline of Law and Procedure in

Representation Cases § 20-370. Accordingly, if the Region has determined that Opera Colorado's employment patterns are not so unusual as to merit application of *The Juilliard School* formula, then the election should be directed to occur after November 4, 2023, once the season's first performances have begun. *See also* Tr. 540.

CONCLUSION

For the foregoing reasons, the Region should direct an election for the proposed unit here.

Dated: New York, New York
July 7, 2023

Respectfully submitted,

/s/ Megan Stater Shaw

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing brief to be served this 7th day of July 2023 by email and e-filing through the NLRB website on the following persons:

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

OPERA COLORADO,	:	
	:	
Employer	:	CASE NO. 27 RC 319226
	:	
v.	:	
	:	
AMERICAN GUILD OF -	:	
MUSICAL ARTISTS,	:	
AFL-CIO	:	
	:	
Petitioner.	:	

OPERA COLORADO POST-HEARING BRIEF

Opera Colorado (“Opera Colorado” or the “Employer”) is a non-profit organization that was formed approximately 40-years ago to establish a major production company that could bring live opera performances to audiences in Colorado. Opera Colorado started as a very small opera company located in Denver, producing two operas per season with the hope of growing as funding and more consistent financial support became available. Eventually, Opera Colorado grew and began producing three operas per season. Unfortunately, between 2012 through 2014, due to the fallout of the 2008 economic downturn, Opera Colorado had to reduce back to producing just two operas per season and had to restructure its administrative operations in order to build back to three operas per season. Opera Colorado planned to return to producing three operas during the 2019/2020 season but was unable to do so as a result of the COVID-19 pandemic. After a long hiatus due to the pandemic, Opera Colorado returned to producing three operas per season in the 2021/2022 season thanks to a special fundraising campaign. The first production of the 2023/2024 season begins on November 4, 2023 and the third and final production of the season ends on May 12, 2024.

Opera Colorado engages various performers and other individuals for each production. The typical engagement lasts from four to six weeks in duration from the beginning of rehearsals to the final performance of the opera. The total number of individuals engaged by Opera Colorado for each opera varies from production-to-production based on the needs of each production. Individuals are engaged on a single production basis without any promise or guarantee of future work at Opera Colorado. They may or may not be engaged in future productions based on the number and type of performers needed for the specific future operas being produced and the individual performers specific talents and other potential limitations from previously scheduled commitments and engagements. The performers and other individuals engaged for each production are essentially itinerant artists and individuals who work for themselves and market their skills, talents and experience to multiple opera companies and other performing organizations across the country. They either work as seasonal/casual employees or as independent contractors. They are not employed by a single opera company and move from city-to-city to perform in various other operas or musical productions utilizing either of these designations for their positions.

However, the American Guild of Musical Artists, AFL-CIO (“AGMA” or the “Union”) seeks to represent a bargaining unit that includes the following classifications: solo singers, narrators, stage directors, assistant stage directors, stage managers, assistant stage managers, performers who have speaking parts, choreographers, solo dancers, ensemble dancers, chorus singers, and artists in residence. As of June 1, 2023, the time of the filing of the representation petition by AGMA, Opera Colorado only employed six artists in residence, each of whom officially ended their employment on June 9, 2023.

AGMA inappropriately describes the proposed unit as a wall-to-wall unit, which ignores the fact that Opera Colorado currently has bargaining relationships with two other unions: the

International Alliance of Theatrical Stage Employees and Moving Picture Technicians, Local 7 (“IATSE”) who represents Opera Colorado stage hands; and the American Federation of Musicians who represents the orchestral musicians. Neither of these unions have sought to intervene in this matter

Opera Colorado maintains that the proposed unit is not appropriate for the following reasons:

1. There were no employees in the proposed unit in any of the classifications as of the payroll date preceding the filing of the petition, May 12, 2023, and who remained employed as of the date of the filing of its statement of position:
2. Individuals engaged in the following classifications are independent contractors: solo singers, stage directors, performers with speaking parts, choreographers, solo dancers, ensemble dancers, and chorus singers:
3. Opera Colorado does not and has not employed or engaged narrators;
4. Individuals engaged in the following classifications are seasonal and/or casual and do not fall within the definition of employee: assistant stage director, stage manager, and artists in residence; and
5. Individuals engaged in these classifications do not share a community of interest.¹

As set forth below, Opera Colorado opposes this proposed bargaining unit for the reasons as set forth herein. The credible evidence and well-established law firmly supports Opera Colorado’s position.

¹ .Further, Opera Colorado questions whether the Union has demonstrated the necessary showing of interest to support its petition as it is not clear who signed authorizations cards given that the 2022/2023 has ended and the individuals engaged in this and prior seasons are no longer engaged by Opera Colorado.

II. HEARING TESTIMONY

The hearing in this matter was held on June 23, 2023 and continued on June 26 and June 27, 2023 via zoom before Hearing Officer Stephanie Stroup Scaffidi, who was located at the Offices of the National Labor Relations Board in Denver, Colorado throughout the hearing. Opera Colorado presented one witness: Mr. Gregory Carpenter, the Employer's General and Artistic Director. The Union presented five (5) witnesses: (1) Gina Hays (a/k/a Regina Hays), an individual engaged as a Stage Manager in non-consecutive productions including Opera Colorado's 2021/2022 season for two productions, and as a Production Stage Manager in Opera Colorado's 2022/2023 season for two productions, with other show intervening; (2) Sam Wheeler, National Executive Director of AGMA; (3) Adam De Ros, an individual engaged as an Assistant Stage Director for two productions²; one in February 2022 and the second in May of 2023; (4) Joshua Zabatta (a/k/a Joshua Stanton), an individual engaged as a member of the Opera Colorado chorus for several seasons; and, (5) Rachel Henneberry, an individual engaged as Stage Manager for Opera Colorado on one production In the 2021/2022 season.

Mr. Carpenter has been employed with Opera Colorado for over 19 years and has held the title of General and Artistic Director for the past 16 years. In this capacity, he is responsible for directing all aspects of Opera Colorado, including day-to-day operations, managing staff and working with Opera Colorado's Board of Directors, He is also the artistic director of the Opera and works closely with the music director, Ari Peltó. Together with the music directorMr. Carpenter selects the operas for production each season, the sets and costume designs, and the

² Mr. De Ros was called by the Union to testify about the Stage Director classification, but he has never worked for Opera Colorado in that capacity. As a result, his testimony regarding this classification is second-hand and should be given no weight.

individuals, particularly solo singers, directors and designers needed to bring to life the opera performances selected (Tr. 50 -51).

Mr. Carpenter has considerable industry experience. Prior to his current role he worked as a solo singer where he performed at several opera companies around the country, including Central City Opera, Lyric Opera Cleveland, Cleveland Opera Glimmerglass Opera, Sarasota Opera and Opera Theater of Northern Virginia (Tr. 51- 52). Opera Colorado has been a member of Opera America, an industry group, and Mr. Carpenter has been a Board of Director of this organization from 2010 to 2016. (Tr. 52)

Mr. Sam Wheeler, National Executive Director for AGMA, was called by the Union to testify about the position classifications at Opera Colorado. Mr. Wheeler testified that he has never visited Opera Colorado in person and has no firsthand knowledge of the classifications at Opera Colorado (Tr. 342). Further, on cross examination, Mr. Wheeler admitted that not all of the AGMA contracts that AGMA has with various opera companies around the country contain all of the position classifications included in the petition that was filed (Tr. 346). In fact, based on information from Opera Colorado, AGMA currently represents a total of only 31 opera companies, a small percentage of the approximately 200 opera companies in the United States. The Union admitted into evidence a copy of a letter suggesting a collective bargaining contract between AGMA and Opera Colorado that may have existed over thirty years ago (Union Ex. 29). Mr. Wheeler, however, admitted on cross examination that he doesn't know when that bargaining relationship ended and that there is no current and existing bargaining relationship between AGMA and Opera Colorado (Tr. 347). Mr. Wheeler also admitted that many solo singers and stage directors in the industry have formed and strategically utilize LLCs to take advantage of their independent contractor status to take advantage of the tax code to be able to deduct the significant

expenses they incur on their own behalf as small businesses. They also use agents to represent them (Tr. 355 and 369)³.

As Mr. Carpenter testified, Opera Colorado has for the most part engaged individuals to work on and perform in its productions as independent contractors rather than W-2 employees since before his arrival at Opera Colorado (Tr. 55). In 2018, Opera Colorado moved its Stage Managers and Assistant Stage Managers from independent contractor status to seasonal W-2 employees (Tr. 57). Mr. Carpenter testified that for the upcoming 2023/2024 season Opera Colorado intends to hire a Resident Stage Manager as a full time employee.⁴ The Resident Stage Manager will have supervisory responsibility and will create consistency between all three of its productions, rather than engaging individual Stage Managers for each production as seasonal employees who may or may not be the same individual for each production (Tr. 59-60). This new Resident Stage Management position will replace the Stage Manager classification included in the Union's petition, which will no longer exist. This new Resident Stage Manager position will also have added supervisory responsibility for selecting and managing the assistant stage managers including directing their work and recommending disciplinary action if needed, administrative duties, and managing contracts "normally associated with a company manager." (Tr. 60-70). Previously, the Stage Manager classification was filled by a seasonal employee for each production with a term of employment lasting on average for 6 weeks and the position had no such supervisory responsibility (Tr. 63).

Opera Colorado employed two separate Stage Managers for its most recent 2022/2023 season, one of which was Ms. Gina Hays. Ms. Hays testified for the Union (Tr. 73). Ms. Hayes

³ A number of choreographers, who are also independent contractors, also utilize LLCs for the same apparent tax reasons.

⁴ This future position was incorrectly referred to as a Production Stage Manager position in testimony.

testified that she worked as a free-lance Stage Manager and fills her year by working for multiple opera companies. (Tr. 280). Ms. Rachel Henneberry was also called by the Union to testify about the Stage Manager and Assistant Stage Manager classifications. Ms. Henneberry confirmed that she worked for Opera Colorado on one occasion as a Stage Manager and was engaged as a seasonal employee. She testified that she works for many opera companies during the year, including the Chicago, San Francisco, Seattle and Boston Lyric Opera and has moved around to different opera companies (Tr.506-509).

The Assistant Stage Directors, are also employed as seasonal W-2 employees and assist the Stage Director in implementing the dramatic action that is to take place on stage during each production. They remain with the production after the Stage Director leaves on opening night to ensure the integrity of the Stage Director's vision and direction and to record all stage direction . They are normally employed as seasonal employees for a 6 week period to work on a particular production and receive weekly paychecks but no employee benefits (Tr.79-80). These individuals are typically employed for a single production during the current three opera season and are employed with other opera companies throughout the year. They are typically not residents of Denver and travel into Denver to perform this work for the period that they are engaged (Tr. 85-87). Mr. Carpenter testified that "when they were not under contract for Opera Colorado they can travel and work for any other opera company." (Tr. 91).

Similarly, Assistant Stage Managers are employed as seasonal W-2 employees for each production as well. Typically, Opera Colorado hires two Assistant Stage Managers for each production, or six over the course of a full three opera season. Assistant Stage Managers may or may not work for Opera Colorado on more than 1 production during the season (Tr. 92). Like the Assistant Stage Directors, the Assistant Stage Managers are paid weekly for the period they are

engaged for a production, which is typically a maximum 6 week period (Tr.92-93). The Assistant Stage Managers are free to work for other opera companies when they are not under contract with Opera Colorado. This is a more difficult role to fill and Opera Colorado has experienced more turnover in this classification since the pandemic (Tr. 94). The Assistant Stage Managers work with the Stage Managers and Assistant Stage Directors to implement all aspects of the production for which they have been engaged.

Mr. De Ros testified that he only worked for Opera Colorado as an Assistant Stage Director on two productions (Tr. 367). Mr. De Ros testified regarding his personal knowledge of the Stage Director position even though he has never served in that role for Opera Colorado. On cross examination, Mr. De Ros confirmed that he worked for other opera companies and that he was free to accept or reject an offer of work with Opera Colorado and that he had no right to return to work at Opera Colorado (Tr. 399). Further, he confirmed that Stage Directors are typically employed as independent contractors and are paid on a 1099 basis (Tr. 403).

Artists-in-Residence are typically individuals with minimal opera experience who are recent graduates of masters programs who seek meaningful professional experience and resume building credentials to get started in the opera industry (Tr. 99). They are employed as seasonal employees for one season, and, except in the rare case of exceptional talent, they typically do not return to work for Opera Colorado from for multiple seasons. Opera Colorado employs approximately six Artists-in-Residence per season. Only one of the Artists-in-Residence that were employed last season has been invited back to return to Opera Colorado for the 2023/2024 season (Tr.100). They are employed as seasonal employees and do not receive any employee benefits. They take on smaller “comprimario” roles or may, if they have the requisite skills, become an understudy and may also sing with the Chorus in a production. They also rehearse and deliver all

of Opera Colorado's education and community outreach engagements (Tr. 100-103). In many cases they are seeking to move on to other artist-in residence programs in the country or to launch a solo singer career after they complete their time at Opera Colorado (Tr.103).

As Mr. Carpenter testified, there were no "employees" currently employed by Opera Colorado in the Union's proposed unit as of the payroll date preceding the filing of the petition, May 12, 2023, who remained employed as of the filing of Employer's Statement of Position on June 14, 2023. The opera only employed six Artists-In-Residence as seasonal employees as of June 1, 2023, the date the petition was filed, but whose employment ended on June 9, 2023 (Tr. 15-16). Typically, these former employees have no reasonable expectation of re-employment with Opera Colorado for subsequent productions (Tr. 100).

Mr. Carpenter testified that in his 20 years at Opera Colorado has never engaged a narrator pursuant to a narrator contract at any time (Tr. 107). He indicated that during the pandemic, in 2021, Opera Colorado engaged two solo singers to work on a digital program and gave them general direction and artistic control over the content over the program. As a result of their creative process, they chose to do a narration on the digital program. They viewed this work as part of their contract as solo singers (Tr.108). They were never hired or engaged by Opera Colorado as narrators and Opera Colorado has no plans to engage any narrators in the foreseeable future (Tr. 108)⁵.

Stage Directors are engaged as independent contractors. They are engaged under an independent contractor agreement to work on a particular production and are paid a flat fee for their work in three equal parts: the first payment of which is paid on signing the contract; the second payment is paid on the beginning of rehearsal; and the final payment on opening night (Tr.

⁵ That project did involve the use of a few volunteers to complete, none of which were employed by Opera Colorado.

108-109). The Stage Directors have very specialized skills and experience and typically have been active as stage directors in the industry for many years. They are responsible for exercising their artistic vision to bring the operatic piece to life on the stage. They are selected for their ability to work on a particular opera and many are engaged through agents. The Stage Directors negotiate the terms of their contract with Opera Colorado and are typically engaged for a four and one half week period. Stage Directors start on the first day of rehearsal and leave after opening night. They typically work for multiple opera companies around the country during the year. No director has ever attempted to negotiate an agreement with Opera Colorado to be a W-2 employee. As Mr. Carpenter testified, he exercises very limited control over the Stage Directors work and does his “best to stay out of their way” and leave artistic control to the Stage Director (Tr. 111-112).

Solo Singers are engaged to take on the principal roles in the opera. Opera Colorado typically engages approximately five solo singers per production depending on the opera score being produced. They are highly experienced and skilled singers with exceptional vocal talent who have worked in the industry for many years. Solo singers are engaged as independent contractors. They are self-employed and work for multiple opera companies around the world during the course of the year and do not typically reside in Denver and travel to Denver for the duration of a production. Solo Singers typically have agents who negotiate the terms of their contracts with Opera Colorado and are engaged for a five week period during a production, and many have formed and use a LLC for their business. They are paid a performance fee on a 1099 basis for each night of a performance. As Mr. Carpenter testified, at no time during his tenure has a solo artist ever asked to be employed as a W-2 employee. They are typically engaged after participating in an audition process conducted in New York City for a role or through

recommendations or are invited back to Opera Colorado in future years after a an initial successful performance. Mr. Carpenter does not direct their work (Tr. 118-122).

Like Solo Singers, Choreographers are also engaged as independent contractors. In the opera industry there are several different types of Choreographers. Dance Choreographers are the most prevalent. Opera Colorado engages dance Choreographers for those opera productions that require dance movement. The job of the Choreographer is to bring the artistic vision of the dance movement to life in the production. Opera Colorado has also engaged fight Choreographers to handle stage fight choreography in productions that call for that type of movement on stage, and intimacy Choreographers to choreograph intimate scenes among performers in an opera. Choreographers are highly skilled professionals. They are self-employed and work for many other companies in and outside of the opera industry and do employ the use of LLCs as well.. Choreographers are engaged from the first day of rehearsal through opening night of a production, which typically covers a four and one half week period, Like the solo singers and Stage Directors, Mr. Carpenter exercises very limited control over Choreographers work (Tr. 122-127).

With regard to Performers with Speaking Parts, Mr. Carpenter testified that Opera Colorado has not engaged any individuals in this classification during his tenure. He further stated that if there was a need for a performer with a speaking part in the future Opera Colorado would engage that individual as an independent contractor for the same reasons it employs Solo Singers and Stage Directors as independent contractors. If the need ever arose, anyone seeking a potential role as a Performer with a Speaking Part would typically be a highly skilled professionals who have agents (Tr.127-130).

Opera Colorado has only engaged two individuals in the classifications of Solo and Ensemble Dancers in the past season. The number of solo or ensemble dancers is dependent on

the needs of the particular production. Like Solo Singers, the Solo and Ensemble Dancers are engaged as independent contractors for a four to four and one half week period. They are paid per performance on a 1099 basis and they typically work for other dance companies in the Denver metropolitan area and region. Mr. Carpenter testified that during his tenure no Solo or Ensemble Dancer has ever requested to be engaged as a W-2 employee (Tr. 130-134).

Chorus members sing as a group in a production. Depending on the opera score they will play the role of a group of people, such as townspeople, if the opera requires that role. Like Solo Singers, they are engaged as independent contractors and are typically selected through an audition process that Opera Colorado holds once a year. After being selected for a production, Chorus members may be invited back to perform in future productions. Chorus members are paid a flat fee plus on a 1099 basis and a stipend to reimburse them for parking expenses. A significant number of the Chorus members that Opera Colorado engages work other jobs in or outside of the opera industry. They typically rehearse in the evenings or on weekends depending on how much music that must be prepared for a production and are not typically called to every staging rehearsal. Many chorus members are students who are going to school studying music or opera. Depending on the needs of the specific opera production they may be engaged for anywhere from four to eight weeks per production. They are engaged on a production-by-production basis and some Chorus members may be engaged for more than one production per season. However, they are not guaranteed to be engaged on each production in the season and are never required or expected to return for future productions. Many of the chorus members are looking to launch careers as solo artists (Tr. 136-142).

Mr. Joshua Zabatta testified for the Union regarding the Chorus classification and confirmed that he works multiple jobs, including as a singer, piano teacher, and piano technician,

in addition to his engagement as a Chorus member at Opera Colorado (Tr. 415)⁶. Mr. Zabatta testified that several of the Chorus members have full time positions outside of Opera Colorado. He also confirmed that Opera Colorado had no contractual obligation to engage him in future productions and that he was under no obligation to return to perform with Opera Colorado. In fact, he declined an offer to perform in the production of Carmen due to family health issues and because he had other commitments that interfered with rehearsal dates (Tr. 420-467),

II. ARGUMENT

Based on the credible evidence, the proposed bargaining unit is not appropriate and should be rejected by the Board. Each of Opera Colorado's objections to the proposed bargaining unit are fully addressed below.

A. There Are No Employees In the Proposed Unit that Are Eligible to Vote:

As Mr. Carpenter testified, there are no employees employed at Opera Colorado in the proposed petitioned for classifications as of the payroll date preceding the filing of the petition, May 12, 2023, who remained employed as of the filing of Employer's Statement of Position on June 14, 2023. There had only been six Artists-In-Residence employed as seasonal employees as of June 1, 2023, the date the petition was filed, but whose employment ended on June 14, 2023. It is therefore, premature to conduct an election at this time.

1. The Julliard School Formula Is Not the Appropriate Standard to Apply Here.

Since there are no current employees in the proposed unit the Union argues that the Board should apply the formula articulated in *Julliard School and Theatrical Protective Union Local 1, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of*

⁶ As a Chorus member Mr. Zabatta did play a "bit part" in his first production. Most of his singing in and ensemble with other Chorus bit role performers and he performed a handful of solo lines. He did not perform as a Solo Singer in this production. The Union's counsel highlighted that Mr. Zabatta was named on the cast list, but failed to point out that he also showed on the chorus list.

the United States and Canada, AFL-CIO, Petitioner, 208 NLRB 153 (January 7, 1974) to determine individuals who are eligible to vote. In *Julliard* the Employer contended that there was no sufficient nucleus of employees from which the Board can appropriately find a unit. The Employer contended that the "per diem" employees that the union wished to represent were casuals. They worked only on a need basis and they had no expectation of future employment with the School. Unlike the legitimate theatre, Juilliard's theatrical productions are not extravagant commercial undertakings which may run for many weeks and employ large, highly experienced casts. Instead, Juilliard's stage department and the productions it sponsors are designed to serve as a training adjunct to the School's nonprofit educational function. *Id.* Upon consideration of the number and length of the stage productions Juilliard produced and the employment pattern resulting therefrom, the Board held that the most useful formula would be one that accords voting eligibility to all employees who have been employed by the Employer during two productions for a total of 5 working days over a 1-year period, or who have been employed by the Employer for at least 15 days over a 2-year period. *Id.*

In *NLRB v Wang Theater Inc.*, 908 F.3d 108 (1st Cir., 2020), a more recent case addressing the application of the *Julliard* formula, the First Circuit Court of Appeals vacated a Board decision applying the *Julliard* formula. The First Circuit found as follows: The Board's "longstanding and most widely used test" to determine the membership of a bargaining unit at any given time is the *Davison-Paxon* formula. *Trump Taj Mahal Assocs.*, 306 N.L.R.B. 294, 295 (1992) (citing *Davison-Paxon Co.*, 185 N.L.R.B. at 23-24). The Board has repeatedly endorsed the *Davison-Paxon* test. See *Columbus Symphony Orchestra, Inc.*, 350 N.L.R.B. 523, 524 (2007) ("The Board has made it clear that the *Davison-Paxon* formula should be followed absent a showing of special circumstances." Under this test, any employee who regularly averages four hours of work or more

per week for the last quarter prior to the eligibility date in a particular bargaining unit is a member of that unit.

In *Juilliard*, the Board reasoned that because it staged fewer productions than commercial theaters and generally had lower production values than commercial productions, all stage hands (including carpenters, painters, and electricians), maintenance staff, and employees in the costume, makeup, and props departments, were employed on a per diem basis. The total number of per diem employees ranged from 0 to 155 depending on the time of year. But many stage hands were nonetheless longstanding employees of the Juilliard School. Juilliard "ma[de] a practice of hiring employees who [were] experienced with the facilities at Juilliard and ha[d] proven through past performance their capacity to perform their job functions." These stage hands were essential to Juilliard's core function as a teaching theater.

But, in other cases, the Board has declined to extend the *Juilliard* formula. In *Columbus Symphony Orchestra* the Board reversed a representation hearing decision applying the *Juilliard* formula to part-time stage hands who assisted with seasonal productions at a professional theater. 350 N.L.R.B. at 523. The Board noted that "in recent years . . . it has consistently applied the standard *Davison-Paxon* formula to the entertainment industry employers that operate on a year-round basis." Id. at 524. In *Columbus Symphony Orchestra*, the fact that per diem workers worked at sporadic events, like summer outdoor venue performances, and supplemented a large permanent workforce year-round, was not a "special circumstance" justifying departure from the *Davison-Paxon* formula.

The Board also reversed the Regional Director's decision to apply the *Juilliard* formula in *Steppenwolf Theatre Co.*, 342 N.L.R.B. 69, 71 (2004). The Board reasoned that "[b]ecause

[Steppenwolf] is a professional *theater company* and not an educational institution, its production schedule is much more regular and constant than was the Juilliard School's."

Prior precedent of the Board has set out the fundamental requirements for certifying a collective bargaining unit. A collective bargaining unit must consist of at least two employees. *Foreign Car Center, Inc.*, 129 N.L.R.B. 319, 320 (1960). "[T]he principle of collective bargaining presupposes that there is more than one eligible person who desires to bargain." *Id.* An employer need not bargain with a single-or no-employee bargaining unit if it "does not need or intend to hire . . . [additional workers]." *Westinghouse Elec. Corp.*, 179 N.L.R.B. 289, 289 (1969).

2. There Are No "Special Circumstances" Present At Opera Colorado.

Opera Colorado is not a teaching institution and produces several sophisticated, high value, commercial productions per season with seasoned and experience artists. There are no casual or per diem employees who are provided any assurances that would lead to any expectation of continued employment from production-to-production. As discussed more fully below, Opera Colorado employs only a handful of seasonal employees for each production. These employees have no expectation of continued employment with Opera Colorado in future productions. If for some reason the Board were to apply the *Julliard* formula in this case, the Board will be giving individuals who have only worked on one or two productions over the past two years and who have no expectation of being engaged in the future the opportunity to vote in an election. These individuals would have no vested interest in the outcome of the election whatsoever. This would be an unfair result which does not comport with the purpose and intention of the Act.

There are no "special circumstances" in this case that would suggest that the Board should deviate from the longstanding *Davison-Paxon* formula that has been applied in such cases. But, even before the Board applies any such formula in this case it must first decide whether any of the

individuals engaged by Opera Colorado are in fact statutory employees. As set forth in more detail below, Opera Colorado maintains that they are not.

B. Individuals Engaged As Independent Contractors Are Not Statutory Employees and Are Ineligible to Vote.

Opera Colorado has a number of positions that are exclusively filled with Independent Contractors. Each of the individuals who fill these positions execute independent contractors agreements with Opera Colorado for each opera. Within each agreement, Opera Colorado and the individual performer each acknowledge and agree to the independent contractor role in the specific language contained in each agreement. The independent contractor status applies to the following positions at Opera Colorado: solo singers, stage directors, performers with speaking parts, choreographers, solo dancers, ensemble dancers, and chorus singers. The independent Contractor status of these positions is consistent with vast majority of opera organizations in the United States.

Under Colorado Revised Statute § 8-7-115 (1)(c) and 2, there is a rebuttable presumption that a written document, signed by both the putative employer and putative employee, will evidence that the latter is engaged in an independent trade, occupation, profession, or business and is free from control in the performance of the service. The contracts that Opera Colorado has entered into with these individuals meet the requirements of this rebuttable presumption under state law. All of these individuals sign contracts indicating their independent contractor status. Legal counsel reviews the these agreement to ensure compliance with the law. Opera Colorado has never had any challenges to them, and this is standard in the industry.

Section 2(3) of the National Labor Relations Act provides that “(t)he term ‘employee’ shall include any employees . . . but shall not include . . . any individual having the status of independent contractor. 29 U.S.C. § 152(3), See also, *The Atlanta Opera, Inc. and Make-Up Artists and Hair Stylists Union, Local 798, IATSE*, Case 10-RC-2769 (June 23, 2023)..

Here, the Union has improperly petitioned for a “wall-to-wall bargaining unit” consisting of all non-management positions and current performers not represented by one of the two bargaining units currently present at Opera Colorado. The following positions cannot be considered to be part of any potential bargaining unit that the Union seeks since they are engaged by Opera Colorado as independent contractors and are therefore ineligible for union membership pursuant to the National Labor Relations Act (NLRA) and the Board law.

As articulated in *FedEx Home Delivery v. NLRB*, 563 F.3d 492, and reaffirmed in *Atlanta Opera, Inc.*, to determine whether a worker should be classified as an employee or an independent contractor, the Board and the courts apply the common-law agency test, a requirement that reflects clear congressional will. See *NLRB v. United Ins. Co.*, 390 U.S. 254, 256, 88 S. Ct. 988, 19 L. Ed. 2d 1083 (1968); see also *St. Joseph News Press*, 345 N.L.R.B. 474, 478 (2005) ("Supreme Court precedent teaches us not only that the common law of agency is the standard to measure employee status but also that we have no authority to change it.") (quoting *Dial-A-Mattress Operating Corp.*, 326 N.L.R.B. 884, 894 (1998)).

There is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive, always bearing in mind the "legal distinction between 'employees' . . . and 'independent contractors' . . . is permeated at the fringes by conclusions drawn from the factual setting of the particular industrial dispute." *Id.*, *North Am. Van Lines, Inc. v. NLRB*, 276 U.S. App. D.C. 158, 869 F.2d 596, 599 (D.C. Cir. 1989) ("NAVL").

The common law agency factors for distinguishing between employees and independent contractors include, the extent of control which, by the agreement, the master may exercise over the details of the work; the kind of occupation; whether the worker supplies the instrumentalities,

tools, and the place of work; the method of payment, whether by the time or by the job; the length of time for which the person is employed; whether the work is a part of the regular business of the employer; and the intent of the parties. *Id.*

Although the National Labor Relations Board must decide in the first instance whether individuals claiming the protection of the National Labor Relations Act are employees or independent contractors, the Act requires the Board to resolve that question by reference to the common law of agency. In conducting that inquiry, the Board, like the court, considers the factors set forth in Restatement (Second) of Agency § 220(2).

Restatement (Second) of Agency § 220(2) lists ten factors:

- (1) the extent of control the employer has over the work;
- (2) whether the worker is engaged in a distinct occupation or business;
- (3) whether the kind of occupation is usually done under the direction of the employer or by a specialist without supervision;
- (4) the skill required in the particular occupation;
- (5) whether the employer or worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (6) the length of time for which the person is employed;
- (7) whether the employer pays by the time or by the job;
- (8) whether the worker's work is a part of the regular business of the employer;
- (9) whether the employer and worker believe they are creating an employer-employee relationship; and,

(10) whether the employer is or is not in business. In addition to these factors, the National Labor Relations Board, also like the court, looks to see whether the workers have a significant entrepreneurial opportunity for gain or loss.

No one of these factors are determinative.

The positions improperly petitioned for by the Union which are ineligible for union membership are: solo singers, stage directors, performers with speaking parts, choreographers, ensemble dancers and chorus singers. These positions are independent contractors because they lack the indicia to establish employee status as mandated by the Restatement (Second) of Agency..

Each of the positions the union seeks to include in its proposed bargaining unit lack satisfaction of the factors identified by the Board, especially the prerequisite control factor needed to support an employee finding. Simply because the Opera provides a schedule of performances as well as a schedule of rehearsal dates does not support an employee finding. The uniqueness of each position and the lack of control over the specific method of performance are two key factors which support a finding of independent contractor for each of these positions. *See Associated Musicians*, 206 NLRB 581 (1973) (“When one engages a contractor to build a house, the contractor does not become any less independent because the purchaser determines the kind of house, where it is to be placed, the kind of materials to be used, the times of construction, or even the times of day when building shall take place.”); *Lerohl v. Friends of Minnesota Sinfonia*, 322 F.3d 486 (8th Cir. 2003) (notion that orchestra musicians are always employees when they perform in a band or orchestra because the conductor controls music schedule, music choice, and how music is played “flies in the face of [] common sense”).

Further, the NLRB failed to find the requisite control over the performance needed to establish employee status in factual situations similar to the performances by Opera Colorado. In *Young & Rubicam International, Inc.*, 226 NLRB No. 186 (1976), the Board found that freelance photographers

were independent contractors. In rejecting the petitioner’s argument that “general supervision of the art director over a photographer’s execution of an assignment satisfies the Board’s right to control test,” the Board explained:

“[R]ight to control” refers to an employer’s retention of control over the manner and means by which the individual providing services performs the job, rather than control over the desired result....

The technical and creative means by which the photographer carries out the instruction of the art director and satisfies the requirements of the layout are left to the professional judgment of the photographer—which is logical because it is his professional skill in such matters that the photographer is hired to provide

.
226 NLRB. at 1275.

In addition, the manner in which the work is completed by each of the individual performers is important. Each Opera Colorado performer maintains individual discretion and the autonomy to control the manner in which they perform their role for the opera. While the opera can control the ultimate result, the means and process used by each performer is uniquely their own. *See Boston After Dark, Inc.*, 210 NLRB 38 (1974) (freelance contributors to 15 weekly newspaper held to be independent contractors, even though their work was subject to “correction or substantive editing” by the employer); *Porter Drywall, Inc.*, 362 NLRB No. 6 (2015), slip op. at 3 (control factor, especially discretion in how to complete work, supported independent contractor status).

As will be discussed herein in our analysis of each position the Union seeks to include in the proposed bargaining unit, all of the Opera Colorado positions fail to satisfy the requisite factors necessary to establish that any of these positions are actually employees of Opera Colorado. The Board recognizes that an individual’s “near-absolute autonomy in performing their daily work without supervision supports a finding that they are independent contractors.” *Supershuttle DFW, Inc.*, 367 NLRB No. 75 (2019), slip op. at 19.

1. Solo Singers

The Solo Singers perform the principal roles in each opera (Tr. 117). Most operas performed by Opera Colorado utilize an average of five (5) solo singers per opera. The services of the singers are secured by Opera Colorado after it holds and attends auditions over a three day period in New York or during “house auditions” in Denver, via word of mouth conveyed by the orchestra conductor or colleagues from other opera companies and from prior knowledge gained from previous performances for Opera Colorado. (Tr. 120-121).

Each solo singer possesses very unique and special skills (Tr. 118). Each solo singer has trained for many years and possess extraordinary voice talent within the opera world (Tr. 118). In addition, the Solo Singers each employ voice coaches, physical therapists and other independent experts to help them hone their singing skills and to maintain their vocal strength. These services are all paid for by each individual solo singer.

Samuel Wheeler. National Executive Director of the American Guild of Musical Artists, AFL-CIO (AGMA), testified that solo singers are referred to as “guest artists” because they work at a number of different locations over the course of a year (Tr. 331). Wheeler confirmed that in order to continue to refine their skills most solo singers incur the personal expense of employing language coaches to aid in their performances of foreign language operas, to secure housing in different places around the country, acting lessons as well as the costs of forms of physical therapy, massages, acupuncture and chiropractors (Tr. 359).

In fact, Wheeler’s testimony further confirmed the independent contractor status of Solo Singers when he testified that many performers form a personal LLC to take advantage of tax benefits that would not be available to them if they worked as an employee of Opera Colorado. Describing it as “very standard in the entertainment industry,” Wheeler described the creation of

a personal service corporation, an LLC, as a “sort of legal fiction” which allows the LLC to take the deductions which would not be available to the Solo Singer if that individual was deemed to be an employee of Opera Colorado (Tr. 332).

Prior to being formally engaged by Opera Colorado, each Solo Singer is aware of the opera and the specific role that they are being asked to perform. As veteran opera performers, each solo singer has the right to accept the role or to reject it. Certainly, if the solo singer does not believe that the specific role is not a perfect fit for their talent or style, the solo singer is under no obligation to accept the role (Tr. 228).

Each solo singer has the ability to present their personal interpretation of the character they are performing in the opera through their unique voice. The solo singer is subject to very little control and direction. The solo singer only receives minimal guidance and direction from the director. It is the personal interpretation and voice of each individual solo singer that presents the character to the audience through their on-stage performance.

The solo singers are all employed as independent contractors and paid via a 1099 record of income reporting, pursuant to the terms of a written contract which is typically negotiated by an agent on behalf of the Solo Singer with Opera Colorado. Each solo singer is given an opportunity to review the proposed contract. The solo singer is aware of the specific opera that they are being asked to perform, the role they are being offered and the specific dates that are scheduled for the performance. In addition, they are given the opportunity to ask any questions about the role and any particular requirements that it may involve and the opportunity to reject the specific offer of the solo singe role (Tr.228).

The specific contract utilized by Opera Colorado to engage all of the Solo Singers was admitted into evidence as Employer Exhibit 5. (Er. Ex. 5). The understanding of relationship

between the Solo Singer and Opera Colorado is clear and detailed in the terms of the Artist Agreement. Those very specific terms of agreement between Opera Colorado and the Artist confirm the intention of the parties and that the Solo Singer desires to be an independent contractor. This allows the singer to perform for any other opera in addition to Opera Colorado and that the parties agree that an independent contractor relationship which provides the singer this professional flexibility exists between them. Specifically, Paragraph 2.3 of the Agreement is entitled INDEPENDENT CONTRACTOR and states as follows:

In performance of the services under this AGREEMENT, the Parties agree and acknowledge as follows:

2.3.1 OPERA and ARTIST hereby agree that the services performed by ARTIST are performed as an independent contractor, as not as an employee.

2.3.2 ARTIST is engaged in an independent trade, occupation, profession, or business.

2.3.3 ARTIST does not work exclusively for OPERA.

2.3.4 ARTIST's performance under this contract shall be free from the control and direction of another person.

2.3.5 OPERA will compensate ARTIST for services performed on the basis of an Engagement Fee, as outlined in EXHIBIT C, rather than a salary of hourly rate.

The characteristics establishing an independent contractor relationship between the Solo Singer and Opera Colorado are further evidenced in additional terms contained in the Artist Agreement. Specifically, in Paragraph 2.3.6, OPERA is not required to provide any training for ARTIST and Paragraph 2.3.7 continues that the OPERA will not provide tools or benefits to ARTIST, except that OPERA may supply materials and equipment.

Paragraphs 2.3.8 and 2.3.9 further reinforce the clear intention and desire of the parties. 2.3.8 states that OPERA will not dictate the time of ARTIST's performance of services, except that the OPERA reserves the right to set a completion date and dictate time of performance when necessary. 2.3.9 provides that the Parties will not combines their business operations in any way and will maintain their operations as separate and distinct.

Paragraphs 2.4 and 2.5 of the Artist Agreement continues to reinforce the independent contractor relationship between the parties. 2.4 requires that the Solo Singer provide the Opera with a current form W-9 for tax purposes and that the Opera will issue a 1099-NEC form in compliance with IRS regulations, since the Opera will not with hold any taxes from the pay it provides to the Solo Singer since the artist is an independent contractor.

Paragraph 2.5 further acknowledges the consequences of independent contractor status that the parties agreed upon. The parties acknowledge that the Solo Singer is not entitled to unemployment insurance benefits because of the independent contractor status of the Solo Singer. 2.5.2 provides further indicia of independent contractor status as the Solo Singer is obligated to pay federal and state income tax on the money earned from the Opera Colorado and to file individual tax returns and 2.5.3 confirms the Solo Singer's understanding that as an independent contractor the singer has no authority to either obligate the opera to any debts or contracts or otherwise act for the opera.

The independent contractor status of the Solo Singers used by Opera Colorado is typical within the non-unionized majority of opera organizations in the opera industry. This practice is readily accepted by all solo singers who perform at Opera Colorado as not one solo singer has ever asked to be considered as an employee during Mr. Carpenter's nearly twenty (20) year tenure with the opera, especially during the last five (5) years.

The Solo Singer contract is typically for a very limited duration of approximately five (5) weeks for most of the opera productions. The negotiation results in a contract containing unique financial terms for each Solo Singer, based upon the size and demands of the role.

The Solo Singers are paid on a per performance basis. They are paid during the first intermission of each performance (Tr. 119). Based upon their status as an independent contractor, the Solo Singers are able to secure work at numerous operas around the country and in the world (Tr. 120).

The Solo Singers truly provide their unique skills and personal interpretation of the music they perform as part of each role that they agree to perform. As Mr. Carpenter confirmed, “I do not direct their work in any way, shape or form. (Tr. 122).

The analysis of the independent contractor criteria and the factual evidence introduced during the hearing support a conclusion that Solo Singers are independent contractors

2. The Stage Director

A second position, the Stage Director (“Director”), has also been improperly offered by the Union as a member of the bargaining unit they seek to organize. Like the Solo Singers, the Director position is also an independent contractor and ineligible for union membership. As Greg Carpenter acknowledged during his testimony, Directors are individuals with very special skills acquired from years of experience that enables them to bring their personal artistic vision of a musical opera piece to life on the stage (Tr. 110).

The Director is responsible for bringing his personal vision of the dramatic story of the opera to life on the stage (Tr.112). Greg Carpenter, as head of Opera Colorado, does not interfere with the Director’s vision and autonomy to create the opera. As Mr. Carpenter testified, “I hire

them because I trust their sensibilities, their talents...I do my best to stay out of their way.” (Tr. 113-114).

The Director received the same Artist Agreement for his or her services. Either his or her agent or both are provided sufficient opportunity to review the proposed agreement before agreeing to its terms and executing it. The agreement contains the same acknowledgement of their independent status as well as all of the provisions acknowledging their understanding of their work role and its requirements. Utilizing the same list of factors used to determine independent contractor status of Solo Singers, the individuals engaged as directors by Opera Colorado also satisfy the same criteria needed to establish that they are independent contractors while working Opera Colorado. As a result, the director position is currently considered to be an independent contractor and has been classified as an independent contractor by Opera Colorado since before Mr. Carpenter’s arrival, more than twenty years ago (Tr. 109).

The Stage Director works for Opera Colorado for a very brief period of time. Opera Colorado hires a Director for each of its three seasonal productions. Each director enters into a written independent contractor that is the same as the Solo Singer agreement, the “Artist Agreement”, that is either negotiated directly with the Director or his agent (Tr. 111). The Director is paid the negotiated flat fee for his work on the production in three equal installments. The first installment of their fee is paid at the time of his contract execution, the second payment is made on the first day of rehearsal for the opera and the final installment is made on the opening night of the opera (Tr. 109-110). He is never paid hourly or pursuant to any other method. The Director is not entitled to unemployment insurance benefits at the end of his brief term at Opera Colorado because of the independent contractor nature of his work. The Director is obligated to pay federal

and state income tax on the money earned from the Opera Colorado and to file individual tax returns as required by federal and state law.

The Director's agreement and understanding of his independent contractor status is confirmed by the fact that no director has ever requested to be treated as an employee (Tr.). The standard length of their role as a Director for Opera Colorado is limited to only four to four and one-half weeks in total time commitment. They arrive and begin their work of the first day of rehearsal for the production and depart after the opening night of the opera (Tr. 111-112). Similar with Solo Singers and other opera performers, the Director is not obligated to perform any services after the end of the contractual period. The Director is not guaranteed any additional work by Opera Colorado beyond the limited engagement time period. As a result, directors have the ability to travel and contract with other operas around the United States and anywhere in the world (Tr. 111).

3. Choreographers

A third classification utilized by Opera Colorado are choreographers. The Union also seeks to include these individuals into the bargaining unit they seek to organize. Once again, like Solo Singers and Directors, Choreographers are not eligible for union membership because they are utilized by Opera Colorado as independent contractors.

The choreographers utilized by Opera Colorado fall within three separate and distinct categories, dance choreographer, fight choreographer and intimacy choreographer. Each specific choreographer requires a high level of training and skill (Tr. 122-123). Similar to Solo Singers and Directors, the choreographers work for about a four to a four and one-half week period when they are engaged for a production. They begin their work on the first day of rehearsal and continue to perform services through the opening night of the production. Choreographers are not used in ever

production and are only engaged when their specific skills are needed to enhance a production. or as dance choreographers are only used in about one production per year (Tr. 125). In the performance of their choreography work, each person exercises artistic control over their own work (Tr. 126).

Choreographers are paid pursuant to negotiated flat fee for their services, not on hourly or daily basis. Opera Colorado contacts the potential choreographer, confirms their interest and availability to perform their services and then negotiates a set, flat fee for their services for the production (Tr. 125).

Choreographers are not entitled to unemployment insurance benefits at the end of their brief term at Opera Colorado because of the independent contractor nature of the work. Each choreographer is paid pursuant to a 1099 record and is obligated to pay federal and state income tax on the money earned from Opera Colorado and to file individual tax returns as required by federal and state law.

4. Performers With Speaking Roles

The Union seeks to have a group of performers, Performers With Speaking Roles, designated as members of the bargaining unit that they are trying to organize at Opera Colorado. Currently, the organization does not have any individuals designated in such a capacity for the upcoming 2023/2024 season (Tr. 127-128). In addition, Mr. Carpenter confirmed that he is not aware of anyone being hired in such a role at any time during the last five years (Tr. 128). He confirmed that he has been contracting artists for Opera Colorado since the fall of 2007 and he could not recall ever contracting with someone to perform in a speaking role (Tr. 129) However, Mr. Carpenter did testify to the possible prospective use of a Performer With a Speaking part

during the potential performance of “The Daughter of the Regiment” during the 2024-2025 opera season.

After a brief discussion on the record between counsel for both parties and the Hearing Officer, all parties agreed that the position was too prospective and speculative in nature. The Hearing Officer agreed that “it’s too speculative” and directed Respondent’s Counsel to move on, which he did. As a result, the Performer With a Speaking role should not be considered in the Regional Director’s analysis and this speculative cannot be considered in any potential unit analysis (Tr. 130).

5. Solo and Ensemble Dancers

Another classification that the union improperly seeks to include in their proposed bargaining unit is Solo and Ensemble Dancers. These dancers are skilled performers are independent contracts for Opera Colorado. Like solo singers, they utilize agents to negotiate on their behalf and execute written agreements confirming their status as independent contractors. The written agreement confirms the opera they will be performing in and provides the specific dates for which their services are required, typically an average of four to four and one half weeks. The length of their service varies based upon the opera and the specific role the dancers has agreed to perform (Tr.132).

As with the other independent contract performers, the solo and ensemble knowingly enter the agreement with Opera Colorado understanding their role before executing the agreement. There have been no crossover performers between season, The opera has only had one (1) solo dancer that has returned each year during the past two season of three Opera Colorado opera performances (Tr. 132).

When utilized, the dancers are paid their negotiated contract fee pursuant to 1099 form payments on a per performance basis. In order to help determine the proper per performance compensation rate, Opera Colorado will typically check the Denver market for non-ballet solo dancers rates in being offered by other dance companies (Tr. 133).

The actual work schedule varies based upon the complexity of their role in the Opera. While their contract always ends with the final performance of the scheduled opera, their start can vary based upon the time needed to learn and master their performance. May times the start date for solo and ensemble dancers is after the initial date for the beginning of the overall rehearsal process (Tr. 135).

6. Chorus Singers

Chorus Singers present an additional category of performers that the Union incorrectly seeks to label as employees for purposes of inclusion within their petition. Chorus members have been recognized as independent contractor members of the Opera since before Mr. Carpenter's arrival to Opera Colorado and without interruption at any point during his 20-year tenure with the Opera (Tr. 137).

Chorus singers participate in the chorus aspects of the show (Tr. 136). Each chorus member is engaged pursuant to a standard Contractor Agreement which confirms their understanding of their independent contractor role and the required ability to learn and perform music (Er. Ex. 6).

C. Opera Colorado Has Not And Does Not Employ or Engage Narrators;

Despite the Union's efforts to assert the existence of a narrator position within their alleged bargaining unit, the position does not exist within Opera Colorado. At no time since Mr. Carpenter assumed a leadership role at Opera Colorado approximately twenty years ago has he or any other

member of the opera organization ever hired a narrator. The position simply does not exist within the Opera Colorado structure.

Perhaps the union's confusion with regard to the existence of stems from the fact that in 2021, Opera Colorado engaged two solo singers to work on a digital program, not a stage performance, and gave them artistic control over the content. Opera Colorado gave them general direction over the program and as a result of their creative process they chose to do a narration as part of their contract as solo singers. (Tr.108).

The reality is clear and remains without challenge. The opera does not and has not utilized a narrator position. As a result, the union's effort to add this position to the bargaining unit they are attempting to form must fail.

D. Individuals Engaged in the Following Classifications Are Seasonal Employees: Assistant Stage Director, Stage Manager, and Artists-in-Residence;

The Stage Manager and Assistant Stage Manager are properly classified as seasonal employees. They are employed for a very specific and limited duration. They work for approximately six weeks on a specific opera production and are paid weekly on a 1099 platform without any benefits. They have no additional work guaranteed by Opera Colorado and are free to pursue and perform work for other operas when their limited role is completed.

The Assistant Director is also employed as a seasonal independent contractor. They are also employed pursuant to an independent contractor agreement for a limited period of approximately six weeks. They are only engaged by Opera Colorado to work on one specific opera production and are paid weekly on a 1099 platform and do not receive any benefits. . They are employed in a similar role with various other opera companies throughout the year.

Artists-in-Residence are also employed as seasonal employees for a very limited and

specific period of less than one calendar year. They are rarely employed beyond this period as the typical artist comes to Opera Colorado for the primary purpose of receiving professional training and being able to build their opera industry credentials. They are paid a specific fee for their role and do not receive any benefits. As the Board has recognized, “When it comes to fellowship—and collective bargaining—it looks like “fellows” aren’t treated the same as their permanent status co-workers.” In *Phoenix News Times, LLC and The Newsguild–CWA*, 370 NLRB No. 84 (Feb. 10, 2021), the Board reached a conclusion regarding similar facts to those present in Opera Colorado, the Board found that workers employed at a Phoenix newspaper in a fellowship program of finite duration were temporary workers who could not be included in a bargaining unit.

The Board's test for determining whether seasonal workers are eligible to vote is whether the "seasonal employees . . . share sufficient interests in employment conditions with the other employees to warrant their inclusion in the unit." *Kelly Bros. Nurseries, Inc.*, 140 N.L.R.B. 82, 85-86 (1962). This determination depends upon those employees' expectation of future reemployment: regular seasonal employees with a reasonable expectation of reemployment in the foreseeable future are sufficiently interested in the working conditions of the unit and are eligible to vote on placement in a unit with permanent employees, whereas casual employees with no such expectation are not. *Kelly Bros.*, 140 N.L.R.B. at 85-86. The determination of whether a group of employees has a reasonable expectation of future reemployment is a fact-intensive determination for which there is no "hard and fast rule," see *NLRB v. Bar-Brook Mfg. Co.*, 220 F.2d 832, 834 (5th Cir. 1955),

The Board regularly assesses the following factors: the size of the area labor force, the stability of the employer's labor requirements and the extent to which it is dependent upon seasonal

labor, the actual reemployment season-to-season of the worker complement, and the employer's recall or preference policy regarding seasonal employees. *Maine Apple Growers, Inc.*, 254 N.L.R.B. 501, 502 (1981). See also *Sitka Sound Seafoods, Inc. v. NLRB*, 340 U.S. App. D.C. 383, 206 F.3d 1175, 1179 (D.C. Cir. 2000) (citing the *Maine Apple Growers* factors); Office of the Gen. Counsel, Nat'l Labor Relations Bd., An Outline of Law and Procedure in Representation Cases, 199 (1999) (listing factors militating in favor of finding employees regular seasonal employees inclusion as: same labor force; preferences in rehiring former employees; similarity of duties and benefits; stabilized demand for and dependence on seasonal employees).

Opera Colorado's seasons are short and limited. The individuals engaged as seasonal employees are engaged on a production-by-production basis and have no reasonable expectation of actual reemployment from production to production or season to season.

E. The Proposed Unit Does Not Share An Appropriate Community Of Interest.

Assuming that a union proposes a potential bargaining unit of employees, as defined by Section 2(3) of the NLRA, the Board shall determine the appropriateness of a proposed bargaining unit by examining whether the relevant employees share a community of interest. Here, the Employer has put forth detailed arguments in support of its position that the majority of positions the union seeks to represent are simply not eligible for union membership based upon their status.

However, if the Region concludes that these groups are eligible for union membership, the Board is required to follow set standards to determine whether the petitioned for bargaining unit is appropriate. In making this determination, the Board's "focus is on whether the employees share a 'community of interest.'" *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 491 (1985). In determining whether employees in a proposed unit share a community of interest, the Board examines:

- Whether the employees are organized into a separate department;
- Have distinct skills and training;
- Have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications;
- Are functionally integrated with the Employer's other employees;
- Have frequent contact with other employees;
- Interchange with other employees;
- Have distinct terms and conditions of employment; and,
- Are separately supervised.

United Operations, Inc., 338 NLRB 123, 123 (2002).

Accord: *Agri Processor Co. v. NLRB*, 514 F.3d 1, 8 (D.C. Cir. 2008) (to determine if a community of interest exists, the Board typically looks at the similarity of wages, benefits, skills, duties, working conditions, and supervision of the employee); *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001) ("In determining whether the employees possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration.")

In other words, in determining whether employees in the proposed unit share a community of interest, the Board both insures that they can be fairly represented by a single representative and that bargaining will occur within boundaries that make sense in the employer's particular workplace. This is true not simply because most of the facts at issue (lines of supervision, skill requirements, wage rates, etc.) are established by the employer, but also because the lines across which those facts are compared are typically drawn by the employer: lines between job

classifications (as here), departments, functions, facilities, and the like. Specialty Healthcare, 357 NLRB 934, 942 (2011) .

Here, Opera Colorado has introduced sufficient evidence to support its position that the members of the proposed bargaining unit sought by AGMA does not represent an appropriate bargaining unit. The unit sought by AGMA seeks to join various distinct classification that simply do not have a sufficient community of interest to satisfy the Board standard.

The positions sought to be combined into one unit are not appropriate because they do not rise from a single department. The union seeks to join together and create only one bargaining unit for individuals who work in drastically different positions with varying skill sets, training and talent levels, different pay structures based upon drastically different employment relationships, with varying lengths of one time employment with Opera Colorado without any certainty of future employment.

The skill sets of the positions sought in the unit proposed by the Union are quite distinct. The union proposes the joining of experienced, world renowned stage singers and directors with very novice performers, some of whom have little or no experience performing in on-stage opera performances. While the union argues that all the work is performed in furtherance of the scheduled opera performance, the union ignores the reality of the work that is being performed. The limited interaction and absence of actual integration among the various positions except for during the actual opera performance is crucial in this evaluation. Solo Singers, Solo and Ensemble dancers do not generally practice with, prepare with or other interact with other performers, like chorus members, except during the final preparation and actual performance of the opera. They do not train together, prepare together, earn similar financial remuneration or generally have regular contact. The fact that they are maintained and treated separately by Opera Colorado from other

members of the petitioned for unit is critical. The mere participation of a Solo Singer in an opera for a limited number of performances over a very short duration of time, without any guaranteed expectation to ever return to Opera Colorado to perform again, does not justify their inclusion in a bargaining unit with other individuals.

There is little to any interchange among the members of the petitioned for group. For example, while chorus members do sing, they are never asked to replace a Solo Singer. They are two separate and distinct positions with different goals and expectations that cannot be successfully represented as part of one combined. bargaining unit. As a result, the Employer requests that petitioned for unit is inappropriate and should be dismissed. The Union should be required to reconsider the inappropriateness of their proposed unit and refile alternative petitions based upon a sufficient showing of interest from proposed units that are appropriate for bargaining.

IV. CONCLUSION

Based on the above-cited arguments and authorities, the bargaining unit proposed by the Union is not appropriate. Opera Colorado opposes this proposed bargaining unit on grounds set forth herein. The credible evidence and well-established law firmly supports Opera Colorado's position that the petition filed by the Union should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of July, 2023, the foregoing was filed through the Board's electronic filing system and was served on the Union's counsel and upon the National Labor Relation Board.

/s/ David A. Campbell

David A. Campbell (0066494)

One of the Attorneys for Employer